Supreme Court, U. S.
FILED
FEB 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

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BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

Preliminary Statement

In *Van Lare* v. *Hurley,* No. 74-453, the Commissioner and former Acting Commissioner of the New York State Department of Social Services appeal from a judgment and

order of a three-judge district court for the Southern and Eastern Districts of New York (HAYS, C.J. dissenting) finding 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) unconstitutional under the Due Process Clause and permanently enjoining their enforcement (A. 661-663).* The judgment and order was entered on August 15, 1974 following the remand of *Taylor* v. *Lavine,* 497 F. 2d 1208, from the United States Court of Appeals for the Second Circuit to the district courts.

In *Taylor* v. *Lavine,* No. 74-5054, certiorari was granted to review the decision of the United States Court of Appeals for the Second Circuit (OAKES, C.J. dissenting), dated May 14, 1974, finding 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) consistent with certain federal statutes and regulations governing Aid to Families with Dependent Children and remanding the constitutional claims alleged against the state regulations to a three-judge district court (A. 170).

The *Hurley* and *Taylor* actions were commenced respectively in the Southern and Eastern Districts of New York. Both actions raised substantially identical statutory and constitutional claims and were therefore consolidated on appeal to Second Circuit, *sub nom. Taylor* v. *Lavine* (statutory claims), and on remand to the three-judge court, *sub nom. Hurley* v. *Van Lare* (constitutional claims). By order dated January 13, 1975, this Court consolidated its review of the Second Circuit decision (No. 74-5054) with the appeal from the three-judge district court (No. 74-453) and permitted the filing of one appendix and briefing as one action. The state appellants in No. 74-453, respondents in No. 74-5054, undertook the filing of the opening brief and are hereinafter referred to as "appellants." The appellees in No. 74-453, petitioners in No. 74-5054, are hereinafter referred to as "appellees."

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* References preceded by the letter "A" refer to the Appendix filed in this Court.

Opinions Below

The majority and dissenting opinions of the three-judge district court in *Hurley* v. *Van Lare,* dated August 5, 1974 (A. 639-660), are reported at 380 F. Supp. 167.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit in *Taylor* v. *Lavine,* dated May 14, 1974 (A. 157-184), are reported at 497 F. 2d 1208.

The opinion of the United States District Court for the Southern District of New York in *Hurley* v. *Van Lare,* dated October 3, 1973 (A. 74-94), is reported at 365 F. Supp. 186.

The memorandum and order of the United States District Court for the Eastern District of New York in *Taylor* v. *Lavine,* dated October 10, 1973 (A. 140-143), is unreported.

Jurisdiction

The jurisdiction of this Court to hear the appeal in *Van Lare* v. *Hurley,* No. 74-453, is conferred by 28 U.S.C. § 1253.

The judgment and order appealed from was entered in the district court on August 15, 1974 (A. 661-663). The Jurisdictional Statement was filed on October 18, 1974. Probable jurisdiction was noted on December 9, 1974.

The jurisdiction of this Court to review the Second Circuit decision in *Taylor* v. *Lavine,* No. 74-5054, is conferred by 28 U.S.C. § 1254(1).

The Second Circuit decision is dated May 14, 1974. A petition for rehearing containing the suggestion that the appeal reheard *en banc* was denied on June 18, 1974 (A. 185-186). The Petition for a Writ of Certiorari was filed on August 2, 1974. Certiorari was granted on December 9, 1974.

The jurisdiction of the district courts was conferred by 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

Regulations Involved

18 N.Y.C.R.R. § 352.30 states in part:

352.30 Persons included in the budget

* * *

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular allowance.

18 N.Y.C.R.R. § 352.31 formerly stated in part:

352.31 Estimate of need and application of income

(a) For applicant or recipient.

* * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

* * *

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)." [*]

Sections 352.30 and 352.31(a)(1)-(3) are set forth in full in Exhibit "1" to this brief. The following related federal statutes and regulations and state statutes and regulations are set forth in Exhibit "2": federal statutes—42 U.S.C. §§ 601, 602(a)(7), (10), 606(a), (b), (c); federal regulations—45 C.F.R. § 233.20(a)(1), 233.90(a); state statutes—Social Services Law §§ 131(1), (3), (4), 131-a(1), (2), (3), 145(1), (2), 343, 344(1), 349(A), 350(1)(a); state regulations—18 N.Y.C.R.R. §§ 352.3(a), (c), 352.7(f).

Questions Presented

1. Whether the pro-ration of public assistance shelter allowances when recipients share shelter with non-recipient, non-paying lodgers offends the Social Security Act and implementing regulations governing Aid to Families with Dependent Children?

2. Whether the pro-ration of shelter allowances denies recipients who share shelter with non-recipient, non-paying lodgers the equal protection of the laws?

3. Whether the pro-ration of shelter allowances when recipients share shelter with non-recipient, non-paying

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* Effective July 26, 1974, § 352.31(a)(3) was amended to state in part:

(3) When an applicant or recipient is living, other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:

* * *

(iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part.

lodgers depends on an "irrebuttable presumption" in violation of the recipients' rights to due process of law?

4. Whether the district court erred in refusing to allow evidence of substantial "contributions" of household furnishings made to the Hurley appellees by their lodger prior to the events giving rise to the action and in striking conforming allegations and documentation from appellants' answer?

5. Whether the district court erred in refusing to dismiss the claims of appellees Taylor and Otey as moot notwithstanding neither appellee continued to have a live grievance against § 352.30(d)?

6. Whether the district court erred in defining the appellee class to include recipients who share shelter with contributing lodgers and with non-paying lodgers and in invalidating both provisions of § 352.30(d) when those provisions are severable and no named appellee shared shelter wtih a contributing lodger?

Statement of the Case

A. Shelter Allowances Under New York Public Assistance Programs

The public assistance programs administered by the New York State Department of Social Services and the local social services districts provide for the separate determination of the shelter needs of applicants and recipients and the payment of shelter allowances as separate components of total public assistance benefits.* Social Services Law

* At present, the state and local districts administer AFDC (ADC) and Home Relief-Veteran Assistance. The cost of the AFDC program is shared by the federal government (50%); the state (25%), and the local districts (25%). The cost of the Home Relief—Veterans Assistance program is shared by the state (50%) and the local districts (50%). The basic components of the grant issued under either program are a shelter allowance and a "pre-added" or "basic" flat grant for food, clothing and incidentals. Social Services Law § 131-a(2) (Ex. "2" pp. 10a-11a); 18 N.Y.C.R.R. §§ 352.1-352.4, 352.6, 352.8.

§ 131-a (1), (2) (Ex. "2", pp. 10a-11a); 18 N.Y.C.R.R. §§ 352.1-352.4, 352.6, 352.8.

Shelter allowances for the payment of rent are provided pursuant to 18 NYCRR § 352.3(a) (Ex. "2" p. 14a).* Under the terms of the regulation, each of the 58 local social services districts files a schedule setting forth monthly maximum allowances, by number of rooms, which are sufficient to permit public assistance recipients to obtain housing in accordance with community public health standards. The district then must pay the recipients who occupy an entire dwelling actual rent up to the appropriate maximum. 18 N.Y.C.R.R. § 352.3(a) (Ex. "2" p. 14a).**

In practice, the local districts have varied the terms of § 352.3(a) by using the number of recipients and/or the number of rooms to determine appropriate shelter allowances and have exceeded the scheduled maximums when necessary to obtain suitable housing.*** As a result of the implementation of the schedules and the granting of exceptions, over 93% of New York recipients receive shelter

* Fuel allowances are provided pursuant to Social Services Law 131-a(2) (Ex. "1" p. 11a) and 18 N.Y.C.R.R. § 352.5. They are pro-rated in the same manner as shelter allowances and are not considered further herein.

** A new § 352.3(a) setting forth a state-wide schedule of shelter allowances by social services district and public assistance family size has been published in 18 N.Y.C.R.R. Title 18. The effective date of the new schedule is projected as April 1, 1975. However, the schedule has been filed by 14 districts as their local schedules under § 352.3(a) as it is presently in force. See Defts. Ex. "B" for new schedule and list of the 14 districts which have adopted it (A. 522-525). The new schedule does not affect the principle of pro-ration as expressed in § 352.30(d).

*** For example, the Westchester County Schedule employs both public assistance group size and number of rooms to establish maximums and authorizes exceptions with supervisory approval. Dfts. Ex. "B" (A. 599-602). Assistance group size and number of rooms are used in Madison (A. 548), Nassau (A. 551), Otsego (A. 574-575) and Warren (A. 595-596). Number of rooms is used in Broome (A. 527), Lewis (A. 545-546), Oneida (A. 562), Ontario

(footnote continued on following page)

allowances equal to their shelter costs (A. 258).* Appellees did not contest the methods for establishing shelter allowance maximums, the adequacy of those maximums or appellant Commissioner's acquiescence in the local districts' granting of exceptions (A. 15-28, 107-119).

Shelter is the shared need of all persons living in the same dwelling. Thus an AFDC eligible caretaker relative and child living alone in effect receive two shelter payments, one for the caretaker relative and one for the child, reflecting the fact that the shelter need of each is a share of the dwelling in which they reside and that the entitlement of each is a pro-rated portion of the allowed rent. *Boucher* v. *Minter*, 349 F. Supp. 1240, 1244 (D. Mass. 1972). Sections 352.30(d) and 352.31(a)(3)(iv)** here in issue simply provide a method for determining and compensating the shelter needs of public assistance recipients when they choose to share their dwelling with an additional person (or persons) who is neither an applicant nor a recipient of public assistance and who is therefore not entitled to have his (or her or their) shelter need met from public funds.

(*footnote continued from preceding page*)

(A. 571), Orleans (A. 572), Schenectady (A. 586-587), Schuyler (A. 589) and Yates (A. 603). Assistance group size is used in Cayuga (A. 528), St. Laurence (A. 583) and in the 14 districts that have adopted the new state-wide schedule as their local schedule (A. 522). Only Nassau (A. 551), Onondaga (A. 563-569) and Schenectady (A. 587) have a stated policy against exceptions to the maximums. New York City has no fixed maximums (A. 552-561).

* The remaining 7% consists largely of employed recipients who benefit from certain income exemptions and therefore have extra money available for rent or recipients whose rent only slightly exceeds the allowances they receive (A. 351-352).

** Section 352.30(d) is the operative regulation in issue. Section 352.31(a)(3)(iv), both in the form considered by the courts below and as amended, merely illustrates an appropriate application of § 352.30(d). It was therefore properly regarded as superfluous by both the parties and the court below. The single exception is Judge Oakes' dissenting opinion in the Second Circuit suggesting that on remand, the three judge district court find § 352.31(a)(3)(iv) a "violation of equal protection on the basis of sex" (A. 174). Judge Weinstein writing for the district court majority, rejected the suggestion (A. 654). Any further need to consider the alleged sex discrimination issue was obviated by the recent amendment to § 352.31(a)(3)(iv) which generally substitutes the word "person" for "female" and "man". See p. 5, *ante* and Ex. "1" p. 3a.

Section 352.30(d) defines a lodger as a "non-legally responsible relative" or "unrelated person" who is neither an applicant for nor a recipient of public assistance and who shares a dwelling (or a household in the case of boarding lodgers) with one or more recipients.* He may be a contributing or a non-paying ("non-contributing") lodger.** With respect to contributing lodgers, § 352.30(d) provides that the amount paid in excess of the minimum ($15 monthly for lodgers; $60 monthly for boarding lodgers) shall be income to the public assistance group and offset against the standard of need. Social Services Law § 131-a(1) (Ex. 2, pp. 10a-11a). With respect to non-paying lodgers (those who do not make the minimum $15 payment), § 352.30(d) provides that the shelter allowance be pro-rated among the number of people living in the dwelling and an amount equal to the lodger's fractional share excluded from the allowed rent, i.e., "regular shelter allowance." Pro-rating the allowed rent in this manner enables the social services districts to determine the lodger's shelter need with regard to the number of persons with whom shelter is in fact shared; to separate his shelter need from those of the public assistance group; and to prevent payment of his share from public assistance funds for which he has not demonstrated eligibility.

The factual determinations made in support of proration are as follows: that a "non-responsible relative" or

* For convenience, the lodger is hereinafter generally referred to as a non-recipient and the masculine singular is adopted.

** Section 352.30(d) uses, both "pays" and "contribute". Appellant use the term "pays" throughout when referring to the proration provision of § 352.30(d) since it is directed exclusively to the lodger's own share of shelter cost and the term "contribute" may include a payment for the benefit of the assistance group as well as a payment on the lodger's own behalf.

"unrelated persons" is living with recipients; that he is not himself a recipient; that he has failed to pay at least $15 as his share of shelter cost; the number of recipients in the dwelling; and the allowed rent prior to the lodger's joining them. These determinations are made initially by the local social services district after investigation and may be reviewed at a state fair hearing at the request of the recipients. Social Services Law §§ 135-a, 135-b; 18 N.Y.C.R.R. Part 358.

If a non-recipient chooses to share his dwelling with recipients, New York again distinguishes the shelter need of the non-recipient from those of the recipients and pays shelter allowances to the recipients in proportion to their shares of the shelter cost. 18 N.Y.C.R.R. § 352.3(c) (Ex. "2" p. 15a).*

Since the lodger is a non-recipient, he is not entitled to have his shelter need (or any other need) considered in computing a public assistance budget or paid from public funds. Thus, in distinguishing the shelter need of the non-paying lodger from those of the recipients, § 352.30(d)

* The only difference between § 352.3(c) and § 352.30(d) is that under the former, the actual rent is pro-rated and the recipients receive their shares up to the appropriate maximum whereas under the latter, the allowed rent ("regular shelter allowance") is pro-rated. However, since the allowed rent pro-rated under § 352.30(d) largely equals the actual rent, the recipients receive their fair share of shelter cost regardless of whether § 352.3(c) or §352.30(d) is applied.

Section 352.3(c) was invalidated as inconsistent with 45 C.F.R. § 233.90(a) in *Battle* v. *Lavine*, 44 A.D. 2d 307 (2d Dept. 1974). Principal reliance was placed on Judge Bauman's decision in *Hurley* v. *Van Lare* (A. 74-94) which was subsequently reversed by the Second Circuit (A.157-184). Review of the opinion suggests that § 352.3(c) was not properly in issue. The petitioner's shelter allowance had been discontinued because of her landlord's failure to provide certification of mortgage payments. The question of whether the petitioner in fact shared shelter with the landlord (the petitioner's child's grandfather) or maintained a separate residence was apparently not resolved at the fair hearing. See opinion of CHRIST, J. concurring in part 44 A.D. 2d at 310. The *Battle* case is now on appeal to the New York Court of Appeals.

insures that public monies will be distributed to and conserved for those who meet prescribed eligibility requirements. In addition, since the non-paying lodger must either have the capacity to pay his share of shelter costs or be incapable of doing so, § 352.30(d) prevents the financially capable lodger from diverting public funds from those who are truly "needy" and requires that the allegedly "poor" lodger be examined under the same standards of eligibility and bear the same obligations of repayment as all recipients. Social Services Law §§ 132, 134, 134-a; 18 N.Y.C.R.R. Part 351; 18 N.Y.C.R.R. §§ 352.11, .12, .15, .23, .25, .27, .28.

To the extent that contributing lodger provision of § 352.30(d) exempts the first $15 ($60 for boarding lodgers) paid in any month, it reflects state policy encouraging recipients to take in contributing rather than non-paying lodgers (A. 259-260).

B. The Facts

Appellee Hurley

Appellee Hurley receives public assistance for herself and her three minor children on the AFDC categorial assistance program. Their benefits include a shelter allowance pursuant to 18 N.Y.C.R.R. § 352.3(a) (Ex. "2" pp. 14a-15a).

During the approximate period from December 8, 1969 to March 5, 1971, Mrs. Hurley and her children lived in a first floor apartment at 210 Hillside in Mount Vernon, New York, Westchester County (A. 233).* The apartment con-

* In her papers below, Mrs. Hurley describes two other residences, one at 90 Brookside Avenue in Mount Vernon (A. 19-20, 32, 231, 233) and one in Bloomingburg, New York, in Sullivan County (A. 232, 234). Mrs. Hurley also lived in an upstairs apartment at the same Hillside Avenue address (A. 222). There is no claim that any of Mrs. Hurley's changes of residence were the result of any state or local regulation or policy.

sisted of a living room, kitchen with dining area, three bedrooms and bath.* The actual rent was $150.00 per month. The maximum shelter allowance was $198.00 per month. Defts. Ex. "B" Westchester County Schedule (A. 599). With the exception of the four month period giving rise to her claims, Mrs. Hurley and her children received a shelter allowance of $150.00 a month, or the equivalent of the rent (A. 217, 233).**

From November of 1970 through February of 1971, ADR, a male friend, resided with the Hurleys. Although it is not disputed that ADR was employed during this time, he did not pay any portion of the rent and did not make any contributions to the Hurleys (A. 20-21, 33, 36-37). However, between April of 1969 and September 14, 1970, appellants' alleged before the three-judge court that ADR gave the Hurleys substantial "contributions" of household furnishings including wall-to-wall carpeting, a color television, a bedroom suite, and a dinette set.***

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* Mrs. Hurley's upstairs apartment at Hillside Avenue consisted of five rooms and is the one she apparently describes in her affidavit of July 5, 1974 (A. 233-234). However, during the time she had a non-paying lodger, she lived in the 6 room first floor apartment at that address. See case worker's report A. 222-224. The report was subject to a motion to strike determined adversely to appellants (A. 632-633). That ruling is raised on this appeal. The motion to strike was not predicated on any dispute about the size of the Hurley apartment during the "lodger" period.

** According to a survey conducted by N.Y.D.S.S. in 1971, the mean shelter cost for a public assistance group of four in Westchester County was $148 per month (Defts. Ex. "D", Table 3, A. 619), two dollars less than the Hurleys were in fact paying and substantially less than the Westchester maximums of $182 (3-4 persons, 4 rooms) and $198 (3-4 persons, 5 room) (A. 599).

*** Appellants listed the contributions at paragraph "14" of their Answer in *Hurley* v. *Van Lare* (A. 218) and annexed the caseworker's report of her discovery of the contributions during a "home visit" on September 15, 1970 (A. 222-224). Appellants were also prepared to offer the testimony of the caseworker at the evidentiary hearing in June 26, 1974 (A. 356-359). On appellees' motion, paragraph "14" of the Answer and the report were stricken (A. 632-633). The offer of the caseworker's testimony was also refused (A. 359). Both rulings are raised herein.

Upon verifying that ADR was residing with the Hurleys, that he was neither an applicant for nor a receipient of public assistance and that he had not paid any portion of the rent, the Westchester social services agency advised appellee that the public assistance grant paid to her family would be reduced by $35 per month for the period of ADR's residence (A. 33). The local agency's determination was modified at a state fair hearing to reduce only the shelter allowance by $30 monthly (1/5 x $150.00) for the period of ADR's residence is conformity with § 352.30 (d) (A. 36-37).

The Hurleys presently live in Sullivan County where they continue on the AFDC program. Although they no longer have a lodger residing with them, Mrs. Hurley advised the district court that she wished to have a certain non-paying male friend (not ADR) live with her and would do so but for the pro-ration provision of § 352.30(d) (A. 232, 234). Appellants accept her allegations in this regard as true.

Appellee Taylor

Appellee Taylor receives public assistance for herself and her minor child on the AFDC program. Their benefits include a shelter allowance.

Appellee and her child share an apartment with appellee's sister, Virginia Taylor, in Freeport, New York, in Nassau County. The apartment consists of a living room, kitchen, bedroom and bath (A. 225-226). The actual rent for the apartment (through May 31, 1974) was $180 per month (A. 111). The maximum shelter allowance in Nassau County for an apartment of 3-4 rooms accommodating a public assistance group of three is $165. Dfts. Ex. "B", Nassau County Schedule (A. 551).*

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* The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of three persons in Nassau County as $178 per month. Dfts. Ex. "D" Table 3 (A. 619). Appellee Taylor

(footnote continued on following page)

Prior to January 1973, appellee's sister was a recipient of public assistance on the state Home Relief Program. The Taylor's shelter cost was apportioned between the two programs, $110 per month (⅔ x $165) for appellee and her minor child from AFDC and $55 per month (⅓ x $165) for appellee's sister from Home Relief (A. 112).

In January 1973, Virginia Taylor's Home Relief was discontinued by the Nassau social services agency for failure to provide information concerning her eligibility (A. 262-263). This determination was not appealed in a state fair hearing and was not challenged below (A. 112).

The shelter allowance of appellee and her minor child was continued at the same level (⅔ x $165, or $110 monthly) under § 352.30(d) representing the fact their pro-rata shares of the allowed rent as previously established and did not change by reason of the sister's change in status. Appellee then requested that the shelter allowance for herself and her child be recomputed to provide a maximum allowance for a public assistance group of two ($145 per month) without pro-ration. Her request was refused by the Nassau social services agency, and that

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(footnote continued from preceding page)

did not allege during the proceedings below that either she or her sister had made any effort to locate an apartment within the shelter allowance maximum.

In his affidavit to the three-judge court, Marvin Rachlin, Executive Assistant to the Commissioner of the Nassau County Department of Social Services, describes some special difficulties encountered by that community in establishing appropriate shelter allowance maximums. He states in part that in the absence of county-wide rent control or "stabilization," increases in scheduled maximums have simply resulted in increased rents without cognizable benefit to recipients. A County survey conducted prior to July 1970 showed that 17.6% of the caseload was paying rent in excess of the scheduled maximums. On July 1, 1970 a new schedule with higher maximums was adopted. A County survey conducted just after the adoption of the new maximums showed that the percentage of the caseload paying in excess of the maximum had increased to 18% (A. 264, 265).

agency's action was sustained after fair hearing (A. 112-113, 120-121).

Effective March 14, 1974 Virginia Taylor was restored to public assistance on the Aid to the Disabled Program (A. 262). On or about January 1, 1974, her case was transferred to the federal SSI Program. Appellee Taylor did not allege below that her sister had failed to pay her pro-rata share of shelter cost at anytime following her restoration to public assistance or that her sister was in jeopardy of losing her assistance payments.*

Appellee Otey

Appellee Otey receives public assistance for herself and her minor child on the AFDC program. Their benefits include a shelter allowance.

Appellee and her minor child live in an apartment in Freeport, New York, in Nassau County, consisting of a living room, kitchen, two bedrooms and bath. The rent is $145 per month. The maximum shelter allowance in Nassau County for a two to four room apartment accommodating two people is $145 per month. During the period Mrs. Otey lived alone with her minor child, they received the maximum allowance, or the equivalent of the rent (A. 228-229; Dfts. Ex. "B", Nassau County Schedule, A. 556).**

On or about October 1, 1972, Michael Otey, appellee's adult son, age 24, came to reside with appellee and her

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* 42 U.S.C. § 602(a)(22) (effective, January 1974) precludes co-operative budgeting between AFDC and SSI beneficiaries. Accordingly, appellee Taylor and her minor child may receive up to the shelter allowance maximum appropriate for the number of rooms for a two person assistance group, i.e. $145 per month under the Nassau County Schedule. Dfts. Ex. "B", Nassau County Schedule (A. 556).

** The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of two persons in Nassau County as $141 per month. Dfts. Ex. "D", Table 3 (A. 619).

minor child. He remained there until February 1, 1974 when he obtained public assistance for himself on the State Home Relief Program and left to reside independently (A. 229, 230).

During the period of his residence with appellee, Michael Otey had occasional jobs. He did not pay any portion of the rent or make any contributions to appellee or her minor child (A. 229).

On or about October 26, 1972, the Nassau social services agency advised appellee that the shelter allowance would be pro-rated by ⅓ pursuant to § 352.30(d) to reflect Michael Otey's share of shelter cost. The pro-ration became effective on February 1, 1973 when appellee failed to appear at a state fair hearing she had requested (A. 229).

In the belief that appellee and her minor child were threatened with eviction, the Nassau social services agency advanced Mrs. Otey $45 to be recouped from the March, 1973 "basic" grant. The recoupment was held invalid at a state fair hearing on the ground that appellee was not, in fact, threatened with eviction (A. 126-128, 229-230).

Applicants for Intervention

Phyllis D'Alessio, Loretta Clark and Francesca Aloise applied for intervention on behalf of themselves and their minor children during the proceedings below (A. 41-42, 56-57, 205-206). Their applications were denied on the ground they were members of the class and not in need of immediate relief (A. 86-88).* However, Phyllis D'Alessio testified at the evidentiary hearing before the three-judge court and the facts in support of her claim are treated at some length in the opinions (A. 642-644). They are therefore reviewed below. The facts in support

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* Mrs. Aliose's application was denied during the course of the hearing on June 26, 1974 without specific comment (Original Transcript, p. 180).

of Mrs. Clark's and Mrs. Aloise's claims are reviewed briefly.

Phyllis D'Alessio

Mrs. D'Olessio receives AFDC for herself and her two minor children, including a shelter allowance.

The D'Alessios reside in an apartment in Mount Vernon, New York, in Westchester County. The apartment consists of a living room (12′ x 14′) master bedroom (12′ x 15′) children's bedroom (8′ x 10′) kitchen (9′ x 13½′) bath and an additional room (5′ x 6′) in which Mrs. D'Alessio keeps a refrigerator (A. 236). The rent is $175 per month, and the D'Alessios receive a shelter allowance equal to that amount (A. 46-47).*

On or before January 1, 1973, H.M., a male friend came to reside with the D'Alessios (A. 46, 53).** H.M. has had occasional employment and has received unemployment compensation but has not paid any portion of the rent (A. 47, 271).*** Mrs. D'Alessio contends that both she and H.M. have been ill from time to time and assist each other with the children and household chores during these periods (A. 44, 270-271).

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* The maximum shelter allowance in Westchester County for a two bedroom apartment accommodating a public assistance group of 3-4 persons is $182.00 per month. The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of three persons in Westchester County as $145.00 per month. Dfts. Ex. "D" Table 3 (A. 619).

** At the evidentiary hearing, Mrs. D'Alessio disputed the social services agency's allegation as to the date when H.M. came to live with her on a permanent basis (A. 234-286). However, she conceded that he did live with her after she had won her case in court (A. 284). The reference is to Judge Bauman's opinion dated October 3, 1973 (A. 91).

*** H.M. has apparently resided with the D'Alessios intermittently since 1966 (A. 44). In 1970, he bought Mrs. D'Alessio a bedroom set and a china cabinet (A. 294).

After verifying to its satisfaction that H.M. was residing with the D'Alessios and that he had failed to pay any portion of the rent, the Westchester social services agency advised Mrs. D'Alessio that the shelter allowance would be pro-rated by 1/4 ($43.60) from March 1, 1973 forward to reflect H.M.'s share (A. 53-55; Plfts. Ex. "J" A. 274, 488 and Plfts. Ex. "K" A. 275, 490).

At the June 26th the hearing Mrs. D'Alessio testified in part that she would not ask H.M. to pay his share of the rent because he had recently been released from a three week hospital stay and was unable to work (A. 286);* that H.M. was "[f]ully aware" of the availability of public assistance in New York but wanted "nothing to do with [it]" (A. 287); and that if the shelter allowance were in fact pro-rated, she would make-up H.M.'s share of the rent from the three person "basic" grant provided for herself and her two minor children (A. 276).

Loretta Clark

Mrs. Clark receives AFDC for herself and her five minor children including shelter and fuel allowances.

The Clarks live in Buffalo in Erie County. Their shelter allowance, $75,00, and fuel allowance, $18.20, are the equivalent of actual cost (A. 48-65, 237-239).** The maximum shelter allowance for a public assistance group of six persons in Erie County is $167.00 per month without heat (effective June 1, 1974). Dfts. Ex. "B", Erie County (A. 522).

The Clarks non-paying lodger is a male friend, S.R., who has resided with them since at least December 2, 1973, and

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* Mrs. D'Alessio provided no explanation for why she had not requested or H.M. had not paid his share of the rent in the past although in her initial affidavit she described him as "performing various jobs" to support himself "such as a truck driver's helper, locker room attendant and a golf caddy" (A. 46).

** The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of six persons (without fuel) in Erie County as $105.00 per month. Dfts. Ex. "D", Table 4 (A 619).

who is alleged to be unemployed. Effective January 1, 1973, the Erie social services agency advised Mrs. Clark that the shelter and fuel allowances would be pro-rated to reflect S.R.'s in share. The agency's determination was confirmed after a state fair hearing (A. 63-65).

Francesca Aloise

Mrs. Aloise shares a two bedroom apartment with her two sons, Mario and Carmine, in Brooklyn, New York. Carmine is over 18 years old, is not a student, and is employed.* He has refused to pay any portion of the rent (A. 206-207).

Prior to November 28, 1973, the Aloises received a "basic" grant for a three person assistance group and a shelter allowance of $160.50 per month, the equivalent of the rent (A. 207-209, 212).** On November 12, 1973, the New York City social services agency advised Mrs. Aloise that Carmine would continue to be included in the budget and that all his earnings would be treated as income to the assistance group (A. 207, 209). As a result of a state fair hearing, the New York City determination was reversed. Carmine's needs were excluded from the public assistance budget, and the previously established shelter allowance was pro-rated to reflect Carmine's share (A. 211-214).

The shelter allowances of the named appellees and the D'Alessio and Clark applicants for intervention were con-

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* 42 U.S.C. § 606(a) defines a needy child as one who, *inter alia*, is "under the age of eighteen" or "under the age of twenty-one and . . . a student. . . ."

** New York City has no fixed shelter minimums. Dfts. Ex. "B", New York City Schedule (A. 552-561). The 1971 N.Y.D.S.S. shows the mean shelter cost for a public assistance group of three persons in Brooklyn as $98.00 per month. Dfts. "D," Table 2 (A. 615).

tinued without pro-ration *pendente lite* (A. 87-88). As a result of the judgment and order of the three-judge court (A. 661-663) and the denial of appellants' application for stay pending this appeal, the local social services districts have been directed to cease the pro-ration of shelter allowances pursuant to § 352.30(d) effective August 15, 1974.

C. Proceedings Prior to Remand

Hurley v. *Van Lare* and *Taylor* v. *Lavine* were commenced as separate civil rights actions for injunctive and declaratory relief and for damages in the form of retroactive public assistance benefits.

Hurley was commenced in the United States District Court for the Southern District of New York on August 11, 1972 and assigned to the Hon. Arnold Bauman. An amended complaint was filed on September 1, 1972 (A. 15-28). *Taylor* was commenced in the Eastern District of New York on May 16, 1973 and assigned to the Hon. Jack B. Weinstein.

Both cases were brought by AFDC recipients who challenged the non-paying lodger provision of § 352.30(d) as inconsistent with the Social Security Act § 401 *et seq.*, 42 U.S.C. 601 *et seq.*, and the federal "substitute parent" regulation, 45 C.F.R. § 233.90(a) (A. 25, 116-118) and as violative of their rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment (A. 25-27, 118-119).* In support of their statutory claims, appellees contended that the pro-ration of shelter allowances upon a factual finding that a non-paying lodger was sharing shelter with recipients conclusively presumed that

* The Hurley amended complaint raised two additional constitutional claims, violation of the female recipients' rights to privacy and free association and sex discrimination (A. 26-27). These claims erroneously relied on § 352.31(a)(3)(iv) as the operative regulation. They were rejected by district court majority opinion (A. 654-655) and rendered moot by the recent amendment to § 352.31. See p. 5, *ante* and Ex. "1" pp. 3a-4a).

the lodger was contributing to the shelter needs of the recipents in violation of their rights under § 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10), and § 233.90(a) of the federal regulations (A. 25, 116-118). In support of their constitutional claims, appellees contended that the conclusive presumption urged in support of their statutory claims also violated their rights to due process of law (A. 27, 118) and that classification established by § 352.30(d) between recipients who share shelter with non-paying lodgers and those who have no lodgers violated the former recipients' rights to equal protection of the laws (A. 25-26, 118-119).

The *Hurley* action was heard first by District Judge Bauman on appellees' motion for summary judgment on both the statutory and the constitutional claims (A. 29-31) and on appellees' motion to dismiss for lack of subject matter jurisdiction or, in the alternative, for summary judgment in their favor on the statutory claims (A. 66). Judge Bauman found that appellees' due process claims were sufficient to vest the court with subject matter jurisdiction and then proceeded to determine the statutory claims without convening a three-judge court. *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970). He granted appellees' motion for summary judgment, reading §§ 352.30(d) and 352.31(a)(3)(iv) as "man-in-the-house" rules which "conclusively presume that the lodger is contributing to the family's income" (A. 83). The court rejected appellants' arguments that the "regulations merely prorate the rent among eligible persons and compute the shelter allowance accordingly, leaving the lodger and non-eligible to pay his own way" (A. 84-85). Judge Bauman also granted class action status (A. 75-78),* denied retroactive welfare

* Judge Bauman originally defined the class as "all residents of the State of New York who are or were receiving public assistance, who have had their grants reduced, terminated, suspended

(*footnote continued on following page*)

benefits (A. 88-90) and denied the D'Alessio and Clark applications for intervention (A. 86-88).

Several days after Judge Bauman's opinion in *Hurley*, Judge Weinstein issued his memorandum and order in *Taylor* adopting Judge Bauman's reasoning in relevant part (A. 140-143).*

On appeal to the Second Circuit, the actions were consolidated, *sub nom. Taylor* v. *Lavine*, and the decisions of Judge Bauman and Judge Weinstein on the statutory claims were reversed. (FRIENDLY, HAYS, C.J.J., OAKES, C.J. dissenting A. 170, 184).

Writing for the majority, Circuit Judge Hays recognized that the shelter needs of the recipients could be properly distinguished from that of the non-recipient lodger; that per-share shelter cost would diminish upon the addition of a lodger since the rental cost for the entire dwelling remained constant; and that appellants' obligation under the Social Security Act and § 233.90(a) was limited to meeting the shelter needs of the recipients, not the lodger who had not qualified for assistance. He stated in part (A. 168-170):

(*footnote continued from preceding page*)

or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(d)" (A. 95-96). On December 18, 1973, Judge Bauman signed an Amended Judgment and Order at the request of appellants and with the consent of appellees which defined the class as follows: "All residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance, reduced, terminated, suspended or denied, or who may be threatened with reduction, termination, suspension or denial of public assistance solely because of the presence of a non-contributing lodger in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30(d).

* No class was defined in *Taylor*, and it appears that Judge Weinstein considered the *Taylor* plaintiffs within the class defined in *Hurley* (A. 142).

> Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC—recipient children or caretaker their actual share of housing expenditures. Pro rating housing costs between the recipient and the non-recipient simply reflects the separability of need of the AFDC—eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance.
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> Pro rating housing expenses among recipients and non-recipients of public aid accounts for the economies of scale that are realized when individuals live in groups; per individual costs decrease when the number of individuals living together increases.
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> The objective of § 352.30(d) is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations [invalidated in *King* v. *Smith*, 392 U.S. 309 (1968) and *Lewis* v. *Martin*, 397 U.S. 552 (1970), respectively], the New York regulations do not cut off all aid to families having non-eligible persons in their households. They merely prevent non-eligible persons from benefiting from free living space. New York's interest in preventing non-eligible persons from sharing AFDC benefits is co-extensive with the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid must be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should not be furnished to non-eligible individuals. [Footnotes omitted.]
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In dissent, Judge Oakes acknowledged that the "State is not required . . . to extend AFDC benefits to ineligible persons" but nonetheless found that § 352.30(d) "with-

holds benefits from those rightfully entitled'' rather than precluding public subsidy of the shelter needs of "ineligible" lodgers. His conclusion rests on two erroneous assumptions: First, he assumed that the dwelling is the legal and factual responsibility of the recipients regardless of how many other individuals also reside there and therefore concluded that the recipients must be entitled to a shelter allowance equal to the allowed rent for an entire apartment (A. 179-180). Second, he assumed that once the recipients receive this shelter, or ''apartment,'' allowance,'' it becomes their property or ''resource'' to dispose of as they see fit (A. 180-181). Indeed, Judge Oakes seriously undercut his own argument by recognizing that the lodger's use of the recipients' shelter ''resource'' constituted a diversion of shelter allowance which could be recovered in an action against the lodger.*

As a result of the Second Circuit decision on the statutory claims, the actions were remanded to a three-judge district court to hear and determine the constitutional claims initially alleged (A. 170).

Appellees' petition for rehearing containing the suggestion that the appeal be reheard *en banc* was denied on June 13, 1974 (A. 185-186).

This Court granted appellees' petition for certiorari on December 9, 1974.

D. Proceedings on Remand

On June 26, 1974, the constitutional claims were heard by a three-judge district court consisting of District Judges

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* Section 352.30(d) fulfills exactly this purpose by prohibiting the lodger from obtaining the benefits in the first instance. If Judge Oakes' suggestion were followed, the local social services districts would be obliged to include the lodger in the public assistance budget for the purpose of bi-monthly shelter allowance payments only to bring suit against him the next day on the theory that the allowance had been diverted and/or that an over-payment had been made (A. 181).

Bauman and Weinstein, the convening judges in *Hurley* and *Taylor,* respectively and Circuit Judge Hays, the author of the Second Circuit majority opinion. Pursuant to Judge Weinstein's suggestion, an evidentiary hearing was held (A. 267-362).

At the hearing, appellees offered the testimony of Phyllis D'Alessio (A. 268-295), Dr. Herbert J. Gans, a sociologist and planner (A. 295-316), and Paul Davidoff, an urban planner (A. 316-340) together with numerous affidavits and exhibits (A. 231-256, 363-521). Appellants offered the affidavit and testimony of Linda Harmon, a Senior Program Analyst with N.Y.D.S.S. in the Bureau of Program Development (A. 257-260, 342-356), and the affidavit of Marvin Rachlin, Executive Assistant to the Commissioner of the Nassau County Department of Social Services (A. 261-266)* together with the shelter allowance schedules of the 58 local social services districts (Dfts. Ex. "B", A. 522-603); an HEW guide for determining the needs of public assistance recipients (Dfts. Ex. ''C'', A. 604-613); a 1971 N.Y.D.S.S. study of the shelter costs of recipients (Dfts. Ex. ''D'', A. 614-619); and an exchange of letters between N.Y.D.S.S. and HEW wherein HEW specifically approved § 352.30(d) (A. 620-623).**

If appellees' purpose at the hearing was to establish that the pro-ration of shelter allowances pursuant to § 352.30(d) had a constitutionally proscribed impact on the public assistance group and/or that it raised certain irrebuttable presumptions which were contrary to fact, they failed to

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* The affidavits were offered in lieu of direct examination. Cross-examination of Mr. Rachlin was waived (A. 361).

** Appellants offered the testimony of Carol Yvonne Rasberry, one of Mrs. Hurley's caseworkers, to support their claims of ''contributions'' to the Hurleys by their non-paying lodger. Mrs. Rasberry was not permitted to testify (A. 359).

meet their burden of proof.* If their purpose was simply to describe living arrangement among the poor, that description was not relevant to the legal issue presented and even if deemed relevant, the proof did not show that the pro-ration of shelter allowances had any cognizable effect on such arrangements.

The majority of the district court (per WEINSTEIN, D.J.) sustained appellees' due process challenge to § 352.30(d) (A. 639-656). Circuit Judge Hays dissented in conformity with the views expressed in the Second Circuit majority opinion (A. 657-663).

The district court majority agreed with appellants that the state's obligation under the AFDC program was limited to determining the "actual needs" of recipients as distinguished from those of the non-recipients (A. 641, 652). They also agreed that the classification established by § 352.30(d) between recipients who share shelter with non-paying lodgers and those who did not served the "constitutionally appropriate" objective of allocating "scarce welfare resources where they are most needed" (A. 655). The majority nonetheless found that the regulation raised two alternative irrebuttable presumptions which violated appellees' rights to procedural due process: first, recipients with a non-paying lodger need less housing space for their

* Appellees sought to prove in part that accepting a lodger did not indicate that recipients had more space than they could conveniently use for themselves (A. 305-306, 328). The argument derives from a reference in Judge Hays' Second Circuit opinion that the presence of the lodger raised a "fair inference" that the public assistance group "needs less space for its own use than it is paying rent for" (A. 168). As Judge Oakes noted in dissent, appellants never alleged that § 352.30(d) rested on any assessment of space or that public assistance groups who share shelter with lodgers have more space than those without lodgers (A. 176-177). Appellants made no such allegations before the district court on remand (A. 318). Nontheless, the district court majority cites the "extra space" argument as a presumption relied upon by the State (A. 12-14).

use than they are paying rent for and therefore need less money to pay for less space;* and second, that recipients with a non-paying lodger somehow need less money to pay their own, *pro rata,* share of the rent (A. 641-642, 651).

The majority then found that the due process violations could be cured by making the presumptions "rebuttable" at a state fair hearing where the public assistance group could prove that their individual circumstances were contrary to the allegedly presumed facts (A. 652). Judge Weinstein listed five factors to be considered at the hearings: whether the presence of the lodger in fact diminishes the recipients' shelter needs (A. 653); whether a reduction in the shelter allowance would have an adverse effect on the dependent child; whether the lodger "helps hold" the recipient group together; whether the lodger can or will contribute his share of shelter cost; and whether his presence "saves the state money" (A. 642).

The majority found the state interest in the non-paying lodger provision of § 352.30(d) "constitutionally appropriate" but found it unnecessary to articulate a separate equal protection ground of decision because it "analytically" "overlaps" the due process claim (A. 655). The $15 and $60 (boarding lodgers) income exemptions applicable to recipients with contributing lodgers were considered "anomalies" (A. 653-654). The judgment and order defined the appellee class to include recipients with contributing as well as non-paying lodgers and provided for injunctive and declaratory relief against § 352.30(d) in its entirety apparently relying on the finding that the exemptions were anomalous (662).

* As noted at p. 26 *ante,* § 352.30(d) makes no assumptions about how much space the public assistance group has. It simply allocates the fixed cost of a given amount of space among those who have the beneficial use of it.

In dissent, Judge Hays noted initially that the "presumption" of contribution rejected by the Second Circuit was the same "presumption" claimed before the district court. Accordingly, he found the rationale of *Taylor* v. Lavine controlling (A. 657-658, 660 n. 1).

Judge Hays then found again that the regulation did not depend on any presumption contrary to fact (A. 657, 658, 659):

> The challenged regulation . . . is not unconstitutional. It sets up no "irrebuttable presumption . . . not necessarily or universally true in fact." *Vlandis* v. *Kline,* 412 U.S. 441, 452 (1973).
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> [The Second Circuit in *Taylor* v. *Lavine*] reasoned that prorating shelter costs between AFDC-eligible and non-eligible members of a household insures that AFDC funds are disbursed only to individuals who have demonstrated their need for assistance. It found that the New York regulation is reasonably justified by considerations such as the severability of individual needs, the divisibility of space, and the economies of scale that result from combining small living units into larger groups [.]
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> If the lodger is financially able to contribute to the cost of maintaining the household, New York surely does not offend due process by abating the shelter allowance of the AFDC recipient pro rata according to the lodger's share. If the lodger is not financially able to contribute his share, New York permits him to establish his separate eligibility for public assistance.
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> Any "presumption" of the lodger's means may be refuted at the lodger's initiative in the same forum in which the AFDC recipient was initially required to establish a need for aid. The "conclusive presumption" denounced by the majority is the same "presumption" that attaches to every member of our society: that he is able to pay his own way until and unless he demonstrates the contrary. If the lodger is eligible for public assistance but does not apply, his silence cannot be put at the state's door. If the lodger is too proud to accept welfare—Mrs. [D'Alessio's] testimony indicates that such was Mr. M's motive for not applying for aid—then he ought to be too proud to accept aid from the state indirectly through the eligible AFDC recipient. A non-contributing lodger like Mr. M. has and eats his public assistance cake without demonstrating his need.

On the majority's choice of the recipients' fair hearings as an "alternative means" to the use of "presumptions," Judge Hays commented (A. 659):

> The majority states that the aid recipient's "Fair Hearing" . . . is a "reasonable alternative means" for determining the amount a lodger is willing or able to pay toward the cost of housing. But this statement glosses over the obvious difficulty of determining the means or intent of a person who has not put his affairs before the Social Services Department by applying for public assistance. In none of the recent Supreme Court due process cases cited by the majority did the reasonable alternative means of fact finding entail intrusion into the affairs of any person who did not apply for or seek a governmentally administered benefit or right.
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> In any event, the procedure . . . sanctioned by the majority . . . is surely no less conducive to "familial disintegration" than requiring the lodger to demonstrate his need on his own application.

Judge Hays concluded (A. 659-660):

> While assailing the rationality of section 352.30(d), today's majority embraces irrationality. It creates a unique class of persons who may receive the benefit of state aid without demonstrating any need for such aid. . . . It prefers lodgers in AFDC households over the eligible AFDC recipients themselves, since the latter must bear the burden of demonstrating their eligibility. In our complex society there are no simple means of indentifying households in need of state assistance, or of allocating the limited stock of resources among individuals who have demonstrated a need for such assistance. Section 352.30(d) is a valid attempt by New York to make such an allocation and it ought to be upheld.

On December 9, 1974, this Court noted probable jurisdiction but denied appellants' application for a stay of the judgment and order of the three-judge district court pending the disposition of the appeal in No. 74-453.

On January 13, 1975, this Court granted a joint motion to consolidate its review on certiorari in No. 74-5054 with the appeal from the judgment and order of the district court in No. 74-453.

Summary of Argument

Section 352.30(d) provides shelter allowances to public assistance recipients in direct proportion to their needs in dwellings shared with non-paying lodgers. As a non-recipient, the lodger is not entitled to have his shelter need met with public assistance funds either directly or indirectly. As an individual who is in fact sharing shelter with recipients to whom he owes no legal duty of support and who owe him none, the lodger's shelter need is properly defined as a proportionate share of the allowed rent on the dwelling in which he actually resides. Section 352.30(d)

combines these principles by apportioning the allowed rent in equal shares among the non-paying lodger and the recipients and providing shelter allowances for the recipients' shares, or shelter needs. As a result, each New York recipient who shares a dwelling with a non-paying lodger receives a shelter allowance under § 352.30(d) equal to 100% of his *per capita* standard of need just as recipients without lodgers. No New York recipient, with or without a lodger, receives a flat shelter grant.

Of necessity, the adoption of the criterion "non-paying" lodger and the use of a pro-ration formula which excludes that share from public assistance leaves the lodger's shelter need unmet. This result is consistent with the lodger's status as a non-recipient. It does not "presume" that he has "contributed" to the needs of the recipients he has no obligation to support in an amount that he did not in fact pay. It does not "presume" that the recipients have in fact received the non-existent "contribution." It simply reflects the obligation of the state and local social services districts to provide assistance only for the shelter needs of recipients as distinguished from those of non-recipients. Since New York provides public assistance to everyone whose income falls below the standard of need, a non-paying lodger who is unable to pay his own shelter cost can obtain assistance by demonstrating his eligibility.

As the Second Circuit held in *Taylor* v. *Lavine*, § 352.30 (d) implements rather than opposes federal AFDC legislation requiring that aid must be furnished to meet the needs of all eligible individuals. That legislation necessarily recognizes that the non-paying lodger is not an "eligible individual" and thus no aid must be furnished to meet his needs. It recognizes as well that when eligibles choose to live with non-recipients, the eligibles' needs are properly assessed in light of their actual circumstances rather than on the theory that the eligible is responsible for the needs of the entire group. It would

be just as offensive for the state to hold the recipients responsible for the lodger as it was to hold that the "lodger" responsible for the recipients in *King* v. *Smith*, 392 U.S. 309 (1968). The non-paying lodger provision fulfills just this purpose by considering recipients and non-recipients as the independent people they are in fact and in law. It was affirmatively approved by the HEW Region II Commissioner as consistent with federal regulations prohibiting reduction in need on the basis of "presumed" income.

Section 352.30(d) does not offend either the Equal Protection Clause or the Due Process Clause.

For equal protection purposes, appellees would distinguish between recipients who share shelter with non-paying lodgers and those who have no lodgers. In fact, recipients in both categories receive allowances equal to their *per capita* shares of the allowed rent. However, in the former category the non-recipient, lodger's share is excluded from assistance while in the latter (given groups of equal size), the recipient's share is provided. At best, the challenge is directed to the assessment of needs on the basis of the fact that the dwelling is shared or the effect on the level of assistance occasioned by exclusion of the non-recipient's share and is only properly considered under the traditional "reasonable relation" test. The principal state interests involved are readily apparent: the conservation of limited public assistance funds for those who are qualified and the avoidance of public subsidies of the shelter needs of non-paying lodgers who have not qualified. A classification defined in terms of the non-recipient status of the lodger and his own shelter need, or share, of the allowed rent is demonstrably a "reasonable means" of achieving these legitimate objectives.

The due process claim relies on the wholly inappropriate application of the "irrebuttable presumption" doctrine. That doctrine is not applicable to a classification which

adopts the same characteristics as the legislation it implements or complements, herein the non-recipient status of the lodger and the fact that shelter is shared, and the legislation is not itself challenged as unconstitutional. Further, it is not applicable when the characteristics adopted in defining the classification are precisely tailored to legitimate state interests, and a "hearing" is provided to any affected individual to resolve the issues which determine whether he has been properly excluded or included in the class.

Even if the doctrine is applied, the non-paying lodger provision of § 352.30(d) must be sustained. It rests on the "necessarily" and "universally true" facts that the shelter is shared and that the lodger as a non-recipient is not entitled to have his shelter need met with public funds. Given the determinative quality of these facts, a further, more expanded hearing would reach the same result as the hearing already provided.

To reject this proposition and require the payment of the lodger's share from public funds carries certain "irrebuttable presumptions" of its own. It "presumes" that the state (or the recipients) owes the lodger a duty of support when it in fact does not. It "presumes" that shelter allowances, once established, cannot change, regardless of how many individuals are added to or subtracted from the dwelling with the result that recipients who "lose" their lodger cannot obtain the allowed rent even if they occupy the entire dwelling. It "presumes" that if the recipients move to the "lodger's" home, they are not responsible for any part of that dwelling, as the "lodger" is not responsible in their home, and thus the recipients would receive no shelter allowances. Further, if the recipients are entitled to shelter allowances only to meet their own needs and those needs are defined as the allowed rent on the entire dwelling because the lodger has not in fact paid his share, then the lodger must either be "presumed" to have no shelter need at all or, if he has a shelter need,

it must remain unmet since only the recipients' needs have been provided.

The district court's application of the doctrine effectively amends the relevant legislation to add a new class of aided persons whose entitlement to benefits depends on an assessment of whether they are "good" lodgers or "bad" lodgers and not on whether they qualify under the standard of need or are willing to participate in the public assistance program.

The district court erred in refusing to allow evidence of substantial "contributions" of household furnishings to the Hurley appellees from their non-paying lodger just prior to the time he came to reside with them. This evidence, when coupled with the absence of any allegation that the lodger's financial circumstances had changed between the time of the "contributions" and the time he resided with the Hurley's, showed that the non-paying lodger in fact had the capacity to pay his share of shelter cost and illustrates the regulation's purpose in preventing public assistance shelter subsidies for those who are not truly needy.

The district court also erred in refusing to dismiss the claims of appellees Taylor and Otey as moot when they no longer shared dwellings with non-paying lodgers and the district court could not grant them any relief; the dismissal of the claims would not have mooted the action; and specifically identifiable members of the class were available to be substituted for those appellees.

To the extent that the district court defined the class to include recipients with contributing lodgers and declared the severable contributing lodger provision of § 352.30(d) invalid and enjoined its enforcement, the court acted at the instance of recipients who were not represented and on whose behalf no claim was made with the result that it disallowed a distinct and unchallenged portion of the regulation.

POINT I

The payment of public assistance shelter allowances to recipients in proportion to their actual number in dwellings shared with non-recipient, non-paying lodgers does not offend any provision of the Social Security Act or federal implementing regulations providing for Aid to Families with Dependent Children.

Section 352.30(d) distinguishes the shelter needs of recipients from those of the non-recipient, non-paying lodgers and provides the recipients with shelter allowances from public funds in direct proportion to their actual number in dwellings shared with one or more such lodgers. The regulation is part of the approved New York state plan under the AFDC program, and was specifically approved by the HEW Region II Commissioner during the course of this litigation* (A. 153-155; Defts. Ex. "E", A. 620-623). It conforms with, rather than opposes, provisions of the Social Secruity Act declaring the purposes of that program, defining the classes to be aided and recognizing the appropriateness of the distinguishing the separate needs of recipients who choose to live with non-recipients.

The declared purpose of the AFDC program is to provide assistance for "needy dependent children and the parents of relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain . . . capability for maximum self-support and personal independence consistent with . . . continuing parental care and protection. . . ." 42 U.S.C. § 601 (Ex. "2" p. 5a).** Aid must be furnished to

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* Section 352.30(d) also applies to the state financed Home Relief-Veteran Assistance program as do other state statutes and regulations regulating AFDC. Specific reference to Home Relief-Veteran Assistance are provided where appropriate given the relevance of that program to appellees' constitutional claims.

** Parallel citations to the Social Security Act are omitted in this portion of the brief to avoid unduly encumbering the text.

"all eligible individuals," 42 U.S.C. § 602(a)(10) (Ex. "2" p. 6a). An "eligible individual" is one who has "fully qualified" under the state standard of need, *Jefferson* v. *Hackney,* 406 U.S. 535, 545 (1972), and is within the class of aided persons defined by the Social Security Act. Those persons are "needy" dependent children, deprived of the support of at least one parent and living with either a parent or other specified caretaker relative, 42 U.S.C. § 606 (a) (Ex. "2" p. 7a), and the parent or caretaker relative. 42 U.S.C. § 606(c) (Ex. "2" p. 7a).

Thus, aid to families with dependent children is defined as payments or services to meet the needs of the "qualified" dependent child and, if necessary, the needs of the "qualified" parent or caretaker relative. 42 U.S.C. 606(b) (Ex. "2" p. 6a).• The Social Security Act has authorized only two additions to the aided class: unemployed fathers of otherwise dependent children, 42 U.S.C. § 607, and, at the option of a cooperating state, other individuals who live with the dependent child and who, in that state's judgment, are essential to the child's well-being. 42 U.S.C. §§ 602(a)(7), 606(b) (Ex. "2" pp. 5a, 6a-7a).•• These individuals must likewise qualify under the state standard of need.••• The "AFDC family" consists of these individuals and only these individuals. No provision of federal law requires that the definition of the aided class be expanded to include unqualified lodgers.

• The New York state plan parallels the federal statement of purpose and definitions of those to be aided. Social Services Law §§ 131(1), (3), 349(a), 350(1)(a) (Ex. "2" pp. 9a, 13a, 14a).

•• The New York state plan provides for both these additional categories of AFDC recipients. Social Services Law § 350 (Ex. "2" p. 14a); 18 N.Y.C.R.R. § 352.7(f) (Ex. "2" p. 15a).

••• Home relief defines the aided class as those unable to maintain themselves (as determined under the standard of need) who cannot secure support from responsible relatives and are ineligible for benefits under categorical assistance programs. Social Services Law § 158. It is the general, or residual, assistance category which insures that any New York resident who qualifies under the standard of need receives assistance. *New York State Department of Special Services* v. *Dublino,* 413 U.S. 405, 413 (1973).

The Social Security Act and unchallenged provisions of the New York state plan recognize that when recipients share living arrangements with non-recipients, AFDC must only be provided to meet the recipients' separate needs and not for the benefit of the non-recipients. See 42 U.S.C. § 606(b), (c) (Ex. "2" p. 7a) recognizing that caretaker relative and child may be living with other relatives and individuals who do not qualify for assistance and evidently contemplating that AFDC would be provided only to the extent of the caretaker's and child's needs; 42 U.S.C. § 602(a)(23) recognizing that "needs" involved are individual rather than household; Social Services Law § 131(4) (Ex. "2" pp. 9a-10a) applying standard of need to persons who are *members* of a family household; 131-a(1) (Ex. "2" p. 10a) applying standard of need to all items of need of persons who constitute or are *members* of a family household; 143-b providing for protective payments on behalf of recipients "for or toward" the rent on the apartment in which they reside. See Simplified Methods for Determining Needs, HEW 1964, Method III, setting forth procedure for determining the needs of recipients in households shared with non-recipients (A. 610-613). See *Williams* v. *Wohlgemuth,* 366 F. Supp. 541 (W.D. Pa. 1973), *aff'd* 416 U.S. 901 (1974) (needs of dependent child assessed and provided under AFDC even if relative is ineligible); *Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C.) *aff'd* 409 U.S. 807 (1972) (invalidating reduction of AFDC grant to the extent of the child's income but allowing separation of that child's needs and *pro rata* reduction in grant); *Lopez* v. *Vowell,* 471 F. 2d 690 (1973), *aff'd* 411 U.S. 933 (1973) (needs of caretaker and dependent child assessed for AFDC notwithstanding inelibility of caretaker's spouse and other minor children with whom they lived); *Rodriguez* v. *Vowell,* 472 F. 2d 622 (5th Cir. 1973), *cert. den.* 412 U.S. 944 (1973) (needs of caretaker relative assessed for AFDC even if child is ineligible). *Boucher* v. *Minter,* 349 F. Supp. 1240, 1244 (D. Mass. 1972) (needs of dependent children sepa-

rated from those of parent who became ineligible upon remarriage); *Dullea* v. *Ott,* 316 F. Supp. 1273 (D. Mass. 1970) (dismissing as insubstantial a claim against classification in which recipients shared living arrangements with non-recipients and assistance was provided only for recipients' pro-rata shares).

Section 352.30(d) implements this fundamental distinction when recipients share shelter with non-paying lodgers. Under the approved New York state plan, shelter is a separate "item of Need." Social Services Law § 131-a(1), (2) (Ex. "2" pp. 10a-11a). See Simplified Methods for Determining Needs, HEW 1964, Method II treating shelter as a separate component of total benefits and Method III providing for separate treatment of shelter in shared households. Defts. Ex. "C" (A. 606-610, 610-611). Shelter "allowances," not "flat grants," are provided to meet those needs. Social Services Law § 131-a(3) (Ex. "2" pp. 11a-12a); 18 N.Y.C.R.R. § 352.3(a) (Ex. "2" pp. 14a-15a). Since all individuals living in a given dwelling are properly considered as sharing in the beneficial use of that space, each individual's shelter need is properly defined in terms of his *pro rata* share of the cost of the entire unit. If the individuals are public assistance recipients and occupy an entire dwelling their needs and thus their shelter allowances are the equivalent of the allowed rent, i.e., the "regular shelter allowance" under § 352.30(d).* When recipients combine with non-paying lodgers, the recipients continue to receive allowances equal to their proportionate shares of the allowed rent, and thus continue to meet their own shelter needs. The non-paying lodger is a non-recipient. He is not entitled to have his *pro rata* share of the allowed rent, or his shelter need, met with public assistance funds, and therefore no allowance is provided. Section 352.30(d) thus conforms with the Social Security Act by providing AFDC funds for qualified persons within the

* Each recipient in effect receives a separate shelter allowance for his own shelter needs. *Boucher* v. *Minter, supra.*

aided class defined by the Act in direct proportion to their actual shelter needs. As the Second Circuit held (A. 168): "Prorating housing costs between the recipient and non-recipient [pursuant to § 352.30(d)] simply reflects the separability of the need of the AFDC—eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance." Compare *Shea* v. *Vialpando,* 416 U.S. 251 (1974) (invalidating Colorado regulation establishing uniform allowances for AFDC recipients' work related expenses in face of Social Security Act § 402(a)(7), 42 U.S.C. § 602(a)(7), requiring consideration of "any expenses reasonably attributable to the earning of . . . income"); *Carleson* v. *Remillard,* 406 U.S. 598 (1972) (invalidating California regulation which excluded continued absence for military service from definition of "continued absence from the home" under Social Security Act § 406(a)(1), 42 U.S.C. § 606(a)(1)); *Townsend* v. *Swank,* 404 U.S. 282 (1971) (invalidating Illinois exclusion of 18 to 20 year olds attending college or university from AFDC benefits in face of Social Security Act § 406(a)(2)(B), 42 U.S.C. § 606(a)(2)(B), defining dependent child, *inter alia,* as one between the ages of 18 and 21 who is regularly attending college or university); *X* v. *McCorkle,* 333 F. Supp. 1109 (D.N.J. 1970), *aff'd per curiam sub nom. Engelman* v. *Amos,* 404 U.S. 23 (1971) (New Jersey administrative ceiling on earned income did not consider statutory "disregards" as required by Social Security Act § 402(a)(8), 42 U.S.C. § 602(a)(8)).

The pro-ration of shelter allowances does not necessarily result in a "reduced" allowance to the AFDC public assistance group.* While appellee Taylor and her minor child

* The question presented on the Petition for Certiorari is No. 74-5054 erroneously characterizes § 352.30(d) as causing a *pro-rata reduction* "in the 'shelter allowance' of an AFDC family *solely because* of the presence of a non-legally responsible person in the home." (p. 2) (Emphasis added.)

received AFDC and appellee's sister received Home Relief, appellee and her child received shelter allowances of ⅔ of the allowed rent, and appellee's sister received a shelter allowance of ⅓ of the allowed rent. When the sister's Home Relief was discontinued and she became a lodger under § 352.30(d), appellee and her child continued to receive the *same* shelter allowances, ⅔ of the allowed rent reflecting the fact that their needs were neither diminished nor increased by reason of the sister's change in status. In Mrs. D'Alessio's example, her shelter needs and those of her two minor children were initially budgeted on the basis of their occupancy of the entire apartment, e.g. 3/3 of the rent. When H.M., the lodger, moved in, he *added* his own needs, or another share, and the D'Alessios' shelter needs were thereby reduced to ¾ of the rent. The rent was then pro-rated under § 352.30(d) to provide the D'Alessios with ¾ of the rent to meet their own needs and to exclude the needs of H.M. who was not entitled to a public assistance payment for his share. If the D'Alessios had a non-paying lodger when their shelter needs were initially budgeted (or a "lodger" who was a "recipient" on the Home Relief-Veteran Assistance program), their allowance would have been pro-rated (¾, ¼) at that time, and no "reduction" would have taken place. If the D'Alessios then "lost" that lodger, their shelter needs would have been rebudgeted, and their allowance increased.

To refuse to assess and compensate the shelter needs of recipients separately from those of non-paying lodgers provides the lodger with a public subsidy in the form of free shelter notwithstanding his failure to qualify. It places the non-paying lodger above the AFDC or Home Relief recipient who must to qualify under the terms of the respective programs, is subject to the continuing investigation of his eligibility (Social Services Law §§ 132, 134-a; 18 N.Y.C.R.R. Part 351) and obligated to repay the public funds advanced to him should he obtain the resources to do

so. 18 N.Y.C.R.R. §§ 352.11, .12, .15, .23, .25, .27, .28. See *Charleston* v. *Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971), *aff'd* 405 U.S. 970 (1972); *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969). It places recipients who share dwellings with non-paying lodgers in a better position than those who live with contributing lodgers since, under § 352.30(d), the contributing lodgers' payments above $15 per month ($60 for boarding lodgers) are income to the recipients and offset against the standard of need.

Given the consistency between the Social Security Act and state plans which do not maximize recipients' benefits, *Jefferson* v. *Hackney*, 406 U.S. 535, 543-544 (1972), and provide them with only "some aid," *Dandridge* v. *Williams*, 397 U.S. 471, 481 (1970), New York surely does not offend the Act by excluding unqualified, non-paying lodgers and providing AFDC recipients with funds in direct proportion to their needs at 100% of the *per capita* standard of need.

King v. *Smith*, 392 U.S. 309 (1968) and *Lewis* v. *Martin*, 397 U.S. 352 (1970) are not opposed. In both cases, the paramour or MARS was assumed to be meeting the needs of the AFDC recipients either entirely (*King*) or to the extent of his income (*Lewis*) on the basis of a fictitious legal obligation of support not shared by the community at large. *Gaither* v. *Sterret*, 346 F. Supp. 1095 (N.D. Ind.), *aff'd.* 409 U.S. 1070 (1972) (stepparent without duty of support); *X* v. *McCorkle*, 333 F. Supp. 1109 (D. N.J. 1070), *aff'd. per curiam sub nom. Engelman* v. *Amos*, *supra* (same); *Solman* v. *Shapiro*, 300 F. Supp. 403 (D. Conn.), *aff'd.* 396 U.S. 5 (1969) (same); *Rosen* v. *Hursh*, 464 F. 2d 731 (8th Cir. 1972) (same). Section 352.30(d) makes no assumption of support or "contribution" by the lodger to the recipients but merely distinguishes the shelter needs of one from the other in order to meet only the recipients

needs from public funds.* See opinion of HAYS, C.J. in the Second Circuit (A. 168). As this Court has noted, *King* and *Lewis*, like *Townsend* v. *Swank, supra,* and *Carleson* v. *Remillard, supra,* simply stand for the proposition that state law cannot exclude anyone from AFDC benefits who the Social Security Act expressly provides shall be eligible. *New York State Department of Social Services* v. *Dublino,* 413 U.S. at 421. Plainly, in excluding the non-paying lodger, § 352.30(d) excludes the same person the Act excludes.

To read *King* and *Lewis* as appellees suggest merely adopts the reciprocal of the assumption invalidated in those cases, a fictitious legal obligation of support owed to the paramour, the MARS and the lodger by the AFDC recipients and/or the AFDC program.

45 C.F.R. §§ 233.20(a)(3)(ii) and 233.90(a) are also not opposed. See generally Social Security Act § 402(a)(7), 42 U.S.C. § 602(a)(7). The regulations provide for the determination of the needs of applicants and recipients' on the basis of those individuals' resources. They do not, and could not, require that the recipients' needs be determined on the basis of the non-applicant and non-recipient lodger's alleged lack of resources. See 45 C.F.R. § 233.20(a)(1) (Ex. "2" p. 8a). The statement in 45 C.F.R. § 233.90(a) that the "inclusion in the family or the presence in the home, of a 'substitute parent' or

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* The facts alleged in support of Aloise application for intervention show that the principle established by *Lewis* v. *Martin, supra,* is not violated by § 352.30(d). Therein, the AFDC grant was initially reduced by the New York City social services agency to the extent of Mrs. Aloise's adult son's earnings (A. 207, 208) although he owed his mother and brother no duty of support, a clear violation of *Lewis*. At the state fair hearing, the local agency's determination was vacated and only the shelter allowance pro-rated to conform to § 352.30(d) reflecting the continuing AFDC eligibility of Mrs. Aloise and her minor child to the extent of their needs and the non-recipient status of the "non-responsible" adult son (A. 207, 211-214).

'man-in-the-house' or any individual [except one with a legal obligation of support] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income. . . ." refers to the eligibility of the dependent child and the income "available" to that child to meet its *own* needs. It does not require that the child's needs be assessed to include those of the "substitute parent" or "man-in-the-house." See opinion of HAYS, C.J. in the Second Circuit (A. 167).

Even if the non-paying lodger provision of § 352.30(d) is not viewed as implementing the express terms and conditions of the Social Security Act, it must be sustained as complementary to the Act's purposes and thus "within the legitimate sphere of state administration." *New York State Department of Social Services,* 413 U.S. at 422 (sustaining New York Work Rules as complementary to a Work Incentive Program under Social Security Act); *Wyman* v. *James,* 400 U.S. 309 (1971) (sustaining New York "home visit" as appropriate means of ascertaining eligibility and suitability of dependent child's home environment although no such visits were specifically provided under the Act). Section 352.30(d) has been specifically approved by HEW (A. 153-155; Defts. Ex. "E", A. 620-623). It adopts qualified recipient status as determinative of whether a shelter allowance shall be paid for the benefit of an individual, the same condition of eligibility the Social Security Act itself imposes. That the approved New York State plan considers shelter as an allowed item of need and compensates only so much of that need as recipients in fact have, rather than providing "flat shelter grants" which may not consider the question of whether shelter is shared does not violate the Act. See *Jefferson* v. *Hackney* 406 U.S. at 539-545. (Social Security Act allows variance in determining needs and level of benefits and different results may obtain).

POINT II

The payment of shelter allowances to recipients in proportion to their actual number in dwellings shared with non-paying lodgers does not offend the recipients' rights to equal protection of the laws.

A. The appropriate equal protection standard is one of reasonable relation to a legitimate state interest.

The traditional equal protection test of "reasonable relation" to a legitimate state interest continues to be applicable to the review of classifications which affect the assessment of need and the level of benefits available under public assistance programs. *United States Department or Agriculture* v. *Moreno,* 413 U.S. 528, 533-538 (1973) ("equal protection" component of Fifth Amendment); *Jefferson* v. *Hackney,* 406 U.S. 535, 546-551 (1972); *Dandridge* v. *Williams,* 397 U.S. 471, 485-487 (1970). Accord, *Geduldig* v. *Aiello,* 417 U.S. 484, 485-495 (1974) (state disability insurance program); *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1974) (Social Security—"equal protection" component of Fifth Amendment); See *King* v. *Smith,* 392 U.S. 309, 318, 319 (1970); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488 (1955); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

Given the application of the "reasonable relation" test to classifications which either exclude the needs of qualified persons from public assistance or reduce their benefits, it is perforce applicable to Section 352.30(d) which excludes the needs of unqualified non-paying lodgers who are not entitled to any benefits. *United States Department of Agriculture* v. *Moreno, supra* (excluding households whose members were not all related from eligibility for food stamps notwithstanding household was qualified under the standard of need); *Jefferson* v. *Hackney, supra* (greater reduction in the level of benefits for qualified AFDC recipients than for qualified recipients under other categorical assistance programs); *Dandridge* v. *Williams, supra* (needs of youngest dependent children in large families excluded, or, conversely reduced AFDC benefits for large families notwithstanding eligibility of all members under the standard of need); *Geduldig* v. *Aiello, supra* (certain disabilities suffered by insured persons excluded from reimbursement); *Richardson* v. *Belcher, supra* (reducing eligible's Social Security in face of complementary Workmen's Compensation benefits).*

B. The non-paying lodger provision of § 352.30(d) bears a reasonable relation to legitimate state interests in the distribution of limited public assitance funds.

In distinguishing between recipients who have no lodgers and those who share shelter with non-paying lodgers, New York recognizes a significant factual difference in the allocation of shelter costs and achieves its interest in distributing limited public assistance funds to recipients in proportion to their actual shelter needs. Conversely, it achieves its interest in withholding benefits from individuals who have not qualified for them. These interests are patently legitimate. *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 413 (1973); *Jefferson* v. *Hackney,* 406 U.S. at 537; *Dandridge* v. *Williams,* 397 U.S. at 472, 478. As the district court majority stated (A. 655): "The purported objective of this distinction is a constitutionally appropriate one since . . . New York may seek to allocate its scarce welfare resources where they are most needed."

Since the non-paying lodger must either have the capacity to pay his share of shelter cost, or lack such capacity, the regulation lessens the risk that the financially capable lodger will obtain free shelter at public expense

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* The district court majority found that the reasonable relation test was appropriate to § 352.30(d) (A. 655).

and that the "poor" lodger will choose to sustain himself from the "basic" grant provided for the recipients rather than obtaining his own assistance (both shelter allowance and "basic" grant) measured in terms of his own needs, matters equally within the state's legitimate interest.* Opinion of HAYS, C.J. in the district court (A. 658-659).

The non-paying lodger class is defined in terms of the non-recipient status of the lodger, his sharing a dwelling with recipients, and his failure to pay $15 per month. The pro-ration method divides the shelter allowance into shares equal to the number of persons actually residing in the dwelling. Each of these classifying characteristics is rational in itself and, when combined, requires a finding that the non-paying lodger provision of § 352.30(d) is a "reasonable means" of achieving the state interests involved.

There is no warrant under the traditional equal protection standard for a more exacting "means" test requiring examination of the classification for over-or under-inclusiveness. In the "area of economics and social welfare, a

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* The circumstances of the Hurley's, D'Alessio's and Otey's illustrate these interests. Appellants contend that the Hurley's lodger, A.D.R., was at all times financially capable. The contention is based on documentary evidence of numerous "contributions" of household furnishings made by A.D.R. to the Hurley's just prior to the time he became a non-paying "lodger" (A. 222-224) and the absence of any allegation that his financial circumstances changed while he lived with them. Pro-rating the shelter allowance in this case properly avoided public subsidy of A.D.R.'s share. Mrs. D'Alessio testified, in substance, that her non-paying lodger, H.M., was poor, and could not pay his share of the rent. It follows from her testimony that H.M. was also sustaining himself from the "basic" 3 person grant presently provided for Mrs. D'Alessio and her two minor children (A. 275-276). Given the availability of public assistance in New York to anyone whose income falls below the standard of need, H.M.'s conduct in this regard is neither necessary or appropriate. He should seek assistance on his own behalf as Mrs. Otey's son Michael in fact did just after he and his mother became aware of the implications of § 352.30(d). See *Facts ante*, pp. 15-16.

state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U.S. at 485. So long as the state's judgments are rational and free from invidious discrimination, they must be sustained. *Jefferson* v. *Hackney*, 406 U.S. at 546. Accord, *Richardson* v. *Belcher*, 404 U.S. at 81. "For this Court to approve the invalidation of state economic and social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488. That era long ago passed into history. *Ferguson* v. *Skrupa*, 372 U.S. 726.'" *Dandridge* v. *Williams*, 397 U.S. at 484-485.

As demonstrated in Point I, the non-recipient status of the non-paying lodger and the fact that he is sharing shelter with recipients distinguishes the public assistance group with whom he resides from public assistance groups without lodgers in terms of the availability of public funds and in terms of the recipients' shelter needs (if the lodger was added to the public assistance group after the budget was established or subtracted from it). The state is not obligated to provide funds to recipients for the benefit of lodgers. Equally, the state is only obligated to provide shelter allowances to meet the shelter needs of recipients. Those needs are properly separable and defined in terms of the recipients' proportionate shares of the allowed rent on the dwelling in which they reside, not in terms of the entirety of a dwelling which is in fact shared with non-recipients. Thus, recipients who share shelter with non-paying lodgers do not have the same shelter needs as recipients who have no lodgers, and a classification based on these charactertistics is reasonable. Failing this distinction, the recipients must meet the shelter needs of the lodger or he must be "presumed" to have no shelter needs; or the "lodger" (if the recipients move to his home)

must meet the shelter needs of the recipients or they must be "presumed" to have no shelter needs. Since neither the lodger nor the recipient is legally responsible for the support of the other, it would be just as offensive for the state to adopt a policy that the recipient is responsible for the lodger's shelter needs as it was for Alabama and California to adopt a policy that a male lodger was responsible for the support of recipients. *King* v. *Smith,* 392 U.S. 409 (1968); *Lewis* v. *Martin,* 397 U.S. 552 (1970).

The adoption of a $15 per month payment as the "line" which distinguishes the non-paying from the "contributing lodger" is similarly "reasonable". The state is not obliged to acknowledge payments so small as to be unrealistic in light of housing costs or inconsistent with its purpose in obtaining the lodger's share. Equally, the "line" could not be set so high as to make it unrealistic to expect that payments would be forthcoming. In 1971, the average monthly shelter cost for a public assistance group of 4 was $113.00 Def. Ex. "D" (A. 614). A ⅕ (lodger's) share would therefore be $22.60. The $15 line is a fair approximation of that share particularly when it is recognized that on the "contributing" side of the regulation, the first $15 is treated as exempt income to encourage recipients to take in "contributing" lodgers, and only the balance is an income offset against the standard of need (A. 259-260), i.e. the higher the "line", the lower the income offset, the less benefit the state would derive from the lodger's payment. *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Dandridge* v. *Williams,* 397 U.S. at 485.

That recipients and their lodgers could "exchange" $15 monthly payments and thereby avoid pro-ration does not make the use of that amount to distinguish between non-paying and contributing lodgers irrational. See Second Circuit dissent (A. 175 n. 6); District Court majority (A. 653-654). Notably, the record is devoid of any evidence that such "exchanges" in fact occur. Nor is there any

suggestion that either the state or the local social services district would countenance the avoidance of the regulation in that manner. The "contributing" lodger who is in fact a "non-paying" lodger would simply be classified as a non-paying lodger, and the shelter allowance pro-rated. Alternatively, both the recipient and the lodger could be prosecuted under the penalties provision of the Social Services Law. Social Services Law § 145(1) (Ex. "2" p. 12a). Moreover, the logic of the "exchange" argument would apply to any line drawn in terms of dollar amounts between those who would obtain a benefit (recipients with contributing lodgers) and those who would not (recipients with non-paying lodgers) except one drawn at zero.

Pro-rating the shelter allowance in equal shares reflects the fact that all persons who share a common shelter may be expected to have equal (or approximately equal) access to and beneficial use of that shelter. The method was not challenged below and is consistent with the living arrangements described by appellees. Paul Davidoff, one of appellees' expert witnesses at the June 26th hearing, confirmed that expectation as reasonable when he testified that the beneficial use of a dwelling unit is fairly allocable among the number of people who live there (A. 337-338).

When these classifying characteristics are combined, the result under the § 352.30(d) is that each recipient in a dwelling shared with a non-paying lodger receives a shelter allowance in direct proportion to his individual share of the allowed rent.* If as this Court held in *Dandridge* v. *Willams,* 397 U.S. at 480, Maryland offends neither the Social Security Act nor the Equal Protection Clause by providing large AFDC families with "somewhat less than their ascertained per capita standard of need", New York surely does not offend the Equal Protection

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* For 93% of New York recipients, the shelter allowance equals full shelter cost (A. 258).

Clause by providing shelter allowances for all recipients with non-paying lodgers at 100% of the recipients' *per capita* standard of need, and § 352.30(d) must be sustained accordingly. Similarly the classification established by § 352.30(d) is no less reasonable than those sustained in *Geduldig* v. *Aiello, supra; Jefferson* v. *Hackney, supra.* Compare *United States Department of Agriculture* v. *Moreno, supra* (invalidating classification which excluded households which qualified in terms of need but whose members were not all related as irrational in terms of any legitimate governmental interests involved in the program.

C. The "contributing" lodger provision of § 352.30(d) bears a reasonable relation to the state interest in reducing grants and allowances by recipients' income and in encouraging recipients to take in paying lodgers.*

Section 352.30(d) provides that payments made by contributing lodgers over $15 per month ($60 per month boarding lodgers) shall be income to the recipient and offset against the recipient's standard of need.

The offset provision apportions shelter cost (or household expenses in the case of boarding lodgers) by reducing the public assistance benefits previously provided by the amount of the lodger's actual payments. The regulation makes one exception in favor of the recipients to the reduction-by-amount-of-contribution formula: the recipients may retain the first $15 ($60 for boarding lodgers) paid in any given month as "exempt" income.

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* Appellees' equal protection claim below was limited to the distinction between recipients who share shelter with non-paying lodgers and those who have no lodgers (A. 25-26, 118-119, 174, 655). Although the district court did not discuss the contributing lodgers provision except with respect to the potential for the "exchanges" of the exempted income (A. 653-654), the judgment and order defines the class to include recipients with both non-paying and contributing lodgers and declares both provisions of § 352.30(d) invalid and permanently enjoins their operation. Appellants have appealed from these two rulings. They are argued in Point VI, *post.*

To the extent that the contributing lodger provision offsets the lodger's payments as income, it directly implements Social Security Act § 402(a)(7), 42 U.S.C. § 602(a)(7) providing that "the State shall, in determining need, take into consideration any other income or resources of any child or relative claiming aid to families with dependent children . . ." 45 C.F.R. § 233.90(a) (Ex. "2" pp. 8a-9a); Social Services Law § 131-a(1) (Ex. "2" p. 10a). *King* v. *Smith,* 392 U.S. 309, 319 (1968). Accordingly, it must be acknowledged as valid. Opinion of Oakes, J. dissenting in the Second Circuit (A. 174 n. 5).

To the extent that the regulation adopts an "income exemption" as a means of encouraging recipients to engage in an income producing activity by taking in contributing rather than non-paying lodgers (A. 259-260), it follows the established practice of allowing the recipients to retain a portion of their "earnings" as an incentive. Social Security Act §§ 402(a)(8), 42 U.S.C. §§ 602(a)(8), 430 *et seq.*, 630 *et seq.;* Social Services Law § 349-a, *Shea* v. *Vialpando,* 416 U.S. 251 (1974); *Jefferson* v. *Hackney,* 406 U.S. at 539.

The $15 and $60 limits on the income exemption must be sustained "reasonable". *Kahn* v. *Shevin,* 416 U.S. 351 (1974) (applying "reasonableness" test to classification which discriminates in favor of a particular group). See discussion, p. 48, *ante.*

That in some cases the *bona fide* payment of the income exempt amount, or any amount that does not at least equal the lodger's fractional share of the allowed rent, results in the use of public funds for the lodger's benefit is consistent with the purpose of encouraging co-operative arrangements between recipients and their contributing lodgers, and a matter within the state's pre-rogative although not among its obligations under federal law. *Richardson* v. *Belcher, supra* (offset against Social Security less than amount of Workmen's Compensation received).

POINT III

The payment of shelter allowances to recipients in proportion to their number in dwellings shared with non-paying lodgers compensates recipients for their actual shelter needs and does not rest on any irrebuttable presumption in violation of the recipients' rights to due process of law.

Appellees do not claim that their rights to due process of law are violated by any provision of the Social Security Act or the New York Social Services Law defining the aided classes for AFDC or Home Relief—Veteran Assistance or recognizing that the needs of recipients may be separately assessed when they share living arrangements with non-recipients. They do not claim that the New York statutes treating shelter as an allowed "item of need" deny them due process of law.* As demonstrated in Point I, § 352.30(d) implements these statutes when recipients share shelter with non-recipient, non-paying lodgers. At the least, it complements the statutes by adopting qualified recipient status as a basis for assistance, the identical basis for assistance adopted by the statutes themselves. See discussion pp. 38-43, *ante*. Given this consistency between § 352.30(d) and statutes unchallenged under the Due Process Clause, the regulation itself cannot be found "so arbitrary and unreasonable" as to violate that Clause. *Heiner* v. *Donnan*, 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 239-240 (1926).

Equally, in view of the fact that § 352.30(d) bars *all* non-paying lodgers from public assistance benefits on the same basis as the statutes it implements or complements, it must be accepted as consistent with the Due Process Clause. *Bell* v. *Burson*, 402 U.S. 535, 539 (1971) (noting *inter alia* that if statute there involved had uniformly barred the issuance of licenses to all uninsured motorists rather than presuming fault only as to uninsured motorists, no Fourteenth Amendment issue would have been presented).*

* For a review of the provisions involved, see pp. 35-38, *ante*.

Section 352.30(d) does not depend on any irrebutable presumption. As noted, the basis for the classification, qualified recipient status, is taken directly from the unchallenged, underlying legislation and it is uniformly applied to all recipients with non-paying lodgers. When shelter is shared between recipients and non-recipient non-paying lodgers, pro-ration under § 352.30(d) insures that the shelter needs of the recipients, the only individuals the statutes place in the aided class, receive shelter allowances in direct proportion to their needs, while excluding the non-recipient, non-paying lodger, an individual not within the aided class.

The pro-ration formula recognizes that the beneficial use of a dwelling is properly allocated among the number of individuals actually using it and that the cost of the entire dwelling (or the allowed rent) is similarly properly allocated in the same number of individual shares. See discussion pp. 38-39, *ante*. Thus when an individual (whether recipient or non-recipient) is added to the dwelling the number of shares increases and the cost per share decreases (as when an individual is subtracted, the number of shares decreases and the cost per share increases). If the individual that is added is a non-recipient his share has proportionately decreased the other shares notwithstanding that his own share is not compensated with public funds or otherwise "paid". This result achieves a perfect congruence with the terms of the relevant statutes and the actual needs of the recipients, i.e. the recipients are compensated for their shares and the non-paying lodger is not compensated for his. Thus, in stating that the "lodger's

* The definition of the non-paying lodger as one who pays less than $15 per month is also reasonable and necessarily uniform. See p. 48, *ante*.

presence . . . in fact diminishes the [recipient] family's shelter needs" (A. 653) so that the "family needs less money to pay its own, *pro rata,* share of the rent" (A. 651), the district court majority stated what in fact occurs when an individual is added to the dwelling, not an "irrebuttable presumption" contrary to fact. Equally, if an individual were subtracted from the dwelling, the number of shares would decrease, and the remaining individuals would need "more money" to pay their own pro-rata shares (regardless of whether they were recipients or non-recipients). If the remaining individuals were recipients, and the individual who left was a non-recipient, the amount of recipients' shares would increase although the "lost" share had not been "paid" when it was held by the non-recipient. New York recognizes both realities and adjusts recipients' shelter allowances both downward and upward as the occasion requires. See illustrations at pp. 39-41 *ante.*

To accept the district court majority view that pro-ration under § 352.30(d) depends on an "irrebuttable presumption" requires the adoption of certain other "irrebuttable presumptions" which are inconsistent with reality and the sound administration of the public assistance program. First, the district court's view rests on the assumption that shelter needs and thus shelter shares were fixed on the date the recipients' needs were first budgeted. This the assumption permits the court to find that if a "lodger" is added after that date, the shelter allowances of the recipients are not necessarily decreased by the amount allocable to that share. Equally, if the lodger had been with the recipients on the date the budget was first established and he thereafter left, the district court would be compelled to find that the recipients' shares had not increased by the amount previously allocable to the lodger's share. Thus the recipients who would now occupy the entire dwelling would continue to receive less than an allowed rent. Second, the refusal to accept the separate assessment of the shelter needs of recipients and non-

recipient lodgers requires that the grant of shelter allowances turn on the question of who got to the dwelling "first," the recipients or the non-recipient "lodger". In the former instance, the recipients would receive a shelter allowance for the entire dwelling because their shelter needs allegedly do not change because of the addition of the lodger and cannot be separated from those of the lodger (as urged by appellees herein). In the latter instance, the recipients would receive no shelter allowance because the non-recipient's shelter needs would not change because of the addition of the recipients and could not be separated from those of the recipients. Compare 18 N.Y.C.R.R. § 352.3(c) (Ex. "2" p. 15a) providing *inter alia* for prorated shelter allowances when recipients reside "in the home of" a non-responsible relative or friend who is not a recipient of assistance. Third, if recipients are entitled to shelter allowances to meet only their own needs but those needs are deemed to be co-extensive with the allowed rent for the entire dwelling only because the lodger has failed to pay his share, the non-paying lodger is thereby presumed to have no shelter need at all, or, if he has a shelter need, it must have remained unmet since the reciients satisfied only their own needs.

As these "irrebuttable presumptions" illustrate, both the recipients and the lodgers have seperate shelter needs which may be assessed in proportion to their participation in the shared dwelling. That in any given case a lodger's shelter need is unmet either because of his refusal to pay or his refusal to qualify for assistance does not transfer the lodger's need to the recipients. To the exent that the district court majority would require the recipients to meet the entire cost if the lodger lives "with them" (and necessarily require that the lodger meet the entire cost if the recipients live "with him"), it is requiring recipients and lodgers to meet each other's needs and not their own.

The only "true" due process issue presented by § 352.30 (d) is whether a recipient has an opportunity to contest

his assignment to the class of recipients who share shelter with non-paying lodgers, i.e. does he in fact share shelter with a non-paying lodger. *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971). This opportunity is provided to every recipient in New York. The local social services districts investigate every case where shelter is believed to be shared with a lodger prior to taking any administrative action. The recipient is then advised of the proposed action, if any, and if adversely affected, obtains the right to a state fair hearing. Social Services Law §§ 135-a, 135; 18 N.Y.C.R.R. Part 358. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). During these proceedings, the recipient is provided with notice or opportunity to be heard on the determinative issues. Those issues are whether a non-responsible individual has been added to the dwelling who is a non-recipient (i.e. a lodger); whether he has failed to pay at least $15 per month (i.e. a "non-paying" lodger);* the number of recipients and such lodgers; and the amount of the allowed rent. Once these issues are resolved in the agency's favor, the recipient has been shown to possess those characteristics which in fact distinguish him from recipients entitled to the allowed rent, i.e. he now shares shelter with a person who is not entitled to have his shelter need met with public funds, and the recipient's own shelter need has been assessed in light of the change in circumstances and in terms of his participation in the dwelling and allowance provided accordingly.

No further inquiry is required, and no further inquiry could change the result to require payment of the lodger's share with public assistance funds. The point was illus-

* The distinction between "non-paying" and "contributing" determines how the lodger's share of shelter cost will be apportioned, not whether another share has been added. The "non-paying" lodger's share is a fraction of the allowed rent. The "contributing" lodger's payments above the exempt amount are offset against the standard of need and result in a reduction of the amount of assistance previously paid. See Point II, subpoints B and C.

trated at the evidentiary hearing held before the district court. Notwithstanding Mrs. D'Alessio's testimony about her relationship with her non-paying lodger (A. 268-294), the fact remained at the conclusion of the hearing that H.M. had not qualified for assistance, was therefore not entitled to have his shelter need met with public funds, and, indeed, "want[ed] nothing to do with public assistance" (A. 287).

The evidentiary hearing below illustrated in addition that the more far ranging inquiry which the district court believed would "cure" the alleged "irrebuttable presumption" of § 352.30(d) must involve the local agencies in assessing the psychological and social attributes of "lodgers" to determine whether they are "good" or "bad" for the recipients with whom they live. These matters would be considered notwithstanding the fact that the lodger had not sought public aid, and, as in the case of H.M., might refuse to appear before the agency, and notwithstanding the fact that even if the lodger were determined to be "good," he would still not be a person within the aided class until and unless he qualified under the standard of need. Dr. Gans' testimony on appellees' behalf is illustrative: He stated that the poor often live in extended families and with friends; that many of these relatives and friends could be classified as lodgers (A. 298, 299-303);* and that at least some of these relationships were "fragile" (A. 314).

It does not appear how the value of these "fragile" relationships could be assessed by a local social services agency under any kind of uniform standards; how these relationships would be protected by an investigation of their value by a public agency; or even how they could be assessed without the direct and voluntary participation of

* He did not know what percentage were "non-paying" lodgers or of any studies on that point (A. 308).

the lodger. Judge Weinstein's suggestion that the state fair hearing determine, *inter alia,* whether the lodger "helps hold the family unit together" encounters the same difficulties (A. 642).

The hearing below further illustrated that § 352.30(d) does not contribute to housing problems encountered by welfare families. Mr. Davidoff's testimony on appellees' behalf is illustrative: He stated that there was a low vacancy rate that particularly affected poor families (A. 319, 321-322) but conceded that the vacancy rate was immaterial to the allocation of an established rent among a given number of people (A. 331); he stated that overcrowding was a serious problem for low income families in New York State (A. 323) but could not express an opinion, without further study, as to the effect of a regulation which reduced the shelter allowances of recipients every time a non-paying lodger was added to the dwelling (A. 332); he stated further that some of the housing occupied by welfare recipients in lower Westchester County was "substandard" (A. 325) but could not state how the addition of a non-paying lodger made a given apartment more or less substandard (A. 333). Mr. Davidoff also acknowledged that while four recipients occupied an entire dwelling unit, the use of that unit was properly allowable only to them, but that when a fifth person, the lodger, moved in, circumstances changed and the use of the dwelling was allocable to five, rather than four, persons (A. 337-338). He would have left the choice of how the cost of shelter was to be shared, if at all, to the four recipients and the lodger (A. 338).

It is apparent from the illustrations provided that the further inquiry required by the district court majority would not make § 352.30(d) "constitutional" but would in fact extend the scope of the existing federal and state programs and require administrators, and ultimately courts, to make judgments of social policy which are within the legislative pre-rogative. *Jefferson* v. *Hackney,* 406 U.S. at 551; *Dandridge* v. *Williams,* 397 U.S. at 487.

This Court has previously recognized that the "irrebuttable presumption" doctrine must be applied with "extreme care" to avoid just such unwarranted interference with the legislative power. *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632, 39 L. Ed. 2d 52, 66-70 (1974) (POWELL, J. concurring in result) and 70-72 (REHNQUIST, J. dissenting); *Vlandis* v. *Kline,* 412 U.S. 441, 459-463 (1973) (BURGER, Ch. J. dissenting) and 463-469 (REHNQUIST, J. dissenting); *Stanley* v. *Illinois,* 405 U.S. 645, 662 (1972) (BURGER, Ch. J. dissenting).

The Court's prior applications of the "irrebuttable presumption" doctrine are not opposed. In no case has the doctrine been applied to a classification which included or excluded individuals in perfect congruity with a legitimate legislative purpose. In no case has the doctrine been applied when the individual affected by the classification was provided with an opportunity to contest his inclusion or exclusion from the class or where even a potentially affected individual can conveniently adjust his status as herein the non-paying lodger may become either a contributing lodger or a recipient. Compare *Cleveland Board of Education* v. *La Fleur, supra* (pregnant teachers presumed physically unfit to teach after further fifth month of pregnancy); *Vlandis* v. *Kline, supra* (entering non-resident student presumed incapable of becoming *bona fide* resident during entire course of studies); *Stanley* v. *Illinois, supra* (unwed father presumed unfit to have custody of natural children); *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973) (entire household presumed ineligible for food stamps from alleged lack of need of one member); *Bell* v. *Burson, supra* (uninsured motorist presumed at fault if involved in accident); *Carrington* v. *Rash,* 308 U.S. 89 (1965) (servicemen presumed incapable of establishing *bona fide* residence if non-resident prior to entry into service); *Heiner* v. *Donnan, supra* (gifts made within 2 years of death of donor

presumed to be made in contemplation of death); *Schlesinger* v. *Wisconsin, supra* (1926) (gifts made within 6 years of death of donor).

The non-paying lodger is not "presumed" to be a non-recipient, he is in fact so until he demonstrates his eligibility. As shown, the interests which support the regulation in this regard are co-extensive with the federal and state interests involved in the public assistance program. The class of recipients with non-paying lodgers is not overinclusive since, by definition, it includes no recipient whose lodger is in fact a recipient and thus neither the recipient nor the lodger is wrongly denied his entitlement. Compare *Cleveland Board of Education* v. *La Fleur,* 32 L.Ed 2d at 63-64; *Vlandis* v. *Kline,* 412 U.S. at 446-448. Neither is it underinclusive since the presence of the non-recipient lodger does not impute non-recipient status to persons who are in fact recipients. Compare *United States Department of Agriculture* v. *Murry,* 413 U.S. at 513-514.

A pro-ration method which distinguishes and compensates the shelter needs of recipients at 100% of their *per capita* standard of need and excludes the need of the non-paying lodger is in fact a "rational measure" for achieving the interests which in turn define the classification. *United States Department of Agriculture* v. *Murry,* 413 U.S. at 511-514. The facts of each case are investigated, and every recipient may have a full hearing to contest his inclusion in the class.

Even if § 352.30(d) is viewed as creating an "irrebuttable presumption," that presumption rests on the "necessarily" and "universally true . . . fact[s]" that the recipients have taken in a non-paying lodger who now shares the dwelling and is not himself a recipient. *Cleveland Board of Education* v. *La Fleur,* 33 L. Ed. 2 at 63, quoting *Vlandis* v. *Kline,* 412 U.S. at 452. See HAYS, C.J. dissenting in the district court, A. 657-660. Nothing further is required to sustain an irrebuttable presumption as valid.

Insofar as the district court majority would require the shelter needs of some non-paying lodgers to be met with public funds on the basis of facts determined at the expanded "hearing," it amends the existing legislation to add the unqualified, non-paying lodger to the aided class in order to obtain what it apparently believes to be more a desirable social result. In so doing it revives long abandoned notions of substantive due process. *Dandridge* v. *Williams,* 397 U.S. at 484-485; *Ferguson* v. *Skrupa,* 372 U.S. 763 (1963).

POINT IV

The District Court erred in refusing to allow evidence of substantial contributions of household furnishings made to appellee Hurley by her lodger prior to the events giving rise to the action and in striking conforming allegations and documentation from appellants' answer.

After remand, a hearing was held upon the suggestion of Judge Weinstein. At the hearing, appellants, having previously pleaded that the Hurleys' non-paying lodger had made extensive contributions to their shared dwelling (A. 218-219), attempted to adduce proof in this regard (A. 356-359). The court, upon plaintiffs' objection ruled the evidence inadmissible and later struck the conforming part of the answer (A. 632-633). In so ruling, the district court committed prejudicial error, warranting a vacatur of the judgment and remand. See Rule 61, F.R. Civ. P.*

While the district court did not articulate its reasons for its ruling on the evidentiary objection and its consequent striking of the answer regarding the furniture contributions of the Hurleys' lodger,** appellees, both below (A. 358-359, 625-627) and in this Court (Appellees' motion to affirm, pp. 11-13) urge two bases for exclusion: lack of relevance, and the alleged pendency of appellants' motion for

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* Cf. Rule 103(a) of the new Federal Rules of Evidence. (Effective July 1, 1975)

** The allegations stricken, would have shown that Hurleys had received wall-to-wall carpeting throughout the apartment, an upholstered sofa, armchairs and draperies, a complete bedroom suite, a color television, and a dinette set, from the individual who became their non-paying lodger. Furniture, obtained from a public assistance furniture grant had been "stored . . . in the basement" (A. 218, 222-223, 224).

summary judgment. Neither of these furnished an adequate basis for the action of the court.

There can be only two types of lodgers, those with the financial capacity to pay their share of shelter and those without such capacity. Opinion of Hays, C.J. in the district court (A. 658). With respect to the former category, § 352.30(d) properly prevents the diversion of limited public assistance funds for the benefit of the lodgers who prefer to expend their income on other "needs". With respect to the latter, the state provides adequate procedures whereby a needy individual can apply for and receive public assistance directly, rather than by the diversion of benefits provided for recipients. The evidence offered to the district court would have shown that ADR was a financially capable lodger who in effect chose to devote substantial resources to the Hurleys' comfort while also choosing to charge his share of the rent against public funds (A. 359).

Appellees' objection on the grounds of relevance was principally concerned with the fact that the gifts alleged were not made during the period that the local agency and the state fair hearing established that ADR was a non-paying lodger, i.e. from November, 1970 through February, 1971 (A. 357-8). While this is true, it does not undercut the relevance of the gifts. The evidence offered would have established that the gifts were made at a time very close to November, 1970, i.e. probably after April, 1969 and before September 15, 1970 (A. 222). There is no dispute as to the fact that ADR was employed prior to the time he became a non-paying lodger, and no change in his employment status was alleged for the period he lived with the Hurleys. These facts would have led the district court to conclude that ADR had the financial capacity to pay his *pro rata* share of the rent during the period that he was a lodger, and consequently, a failure to pro-rate would operate to condone the diversion of public assistance to those

not eligible; an evil § 352.30 was intended to avoid (A. 156).*

Contrary to the allegations made by appellees, appellants did not have a motion for summary judgment pending before the three-judge court. The only summary judgment motions by appellants were made on the statutory "pendent" claims before the single district judges in *Hurley* and *Taylor*, not on the constitutional claims. These motions were granted on the Second Circuit appeal (A. 170). On remand to the three-judge court, appellants answered and did not move (A. 215 *et seq.*). Thus, the only motion properly before the district court was appellees' motion for summary judgment, not that of appellants.

While appellants agree that the gravaman of the statutory and the constitutional claims was the same and thus that the actions could have been disposed of by the three-judge court without further fact finding, an evidentiary hearing was held at the instance of the appellees pursuant to Judge Weinstein's suggestion notwithstanding their own pending motion for summary judgment. The subject matter of hearing was housing conditions and "living arrangements" among the poor. In this context appellants sought to offer additional facts concerning appellee Hurley's "living arrangements" in relation to the operation of the § 352.30(d). Since those facts were relevant to purpose of the regulation, the new issues tendered by appellees and non-cumulative, they should have been admitted.

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* Relevant evidence, is defined by Rule 401 Federal Rules of Evidence as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The Advisory Committee's notes points out that evidence that is background or tends put a problem in context is admissible. 46 F.R.D. 161, 222 (1969).

The standard on appeal is one of harmless error, a standard that is characterized by its result orientation. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939). In this case, while we are necessarily left to speculate as to the effect of the offer of proof on the result; the evidence was both germane to the issues before the court, and not otherwise inadmissible. It cannot be said that the court's ruling did not effect the outcome of the action and that it was not prejudicial error.

Motions to strike redundant, immaterial, impertinent or scandalous matter under F.R. Civ. P. 12(f) are not favored, *Thompson* v. *United Artist Theatre Circuit, Inc.*, 43 F.R.D. 197 (S.D.N.Y. 1967), and should be denied unless the allegations have no possible relation to the controversy, *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862 (5th Cir. 1962), and cause prejudice to one of the parties. *King* v. *Georgia Power Company*, 295 F. Supp. 943 (N.D. Ga. 1968). Even where the allegations come within the literal meaning of the terms of the Rule 12(f), a motion to strike should be denied except upon a showing of unfair prejudice to the moving party. *Budget Dress Corp.* v. *International Ladies' Garment Worker's Union, AFL-CIO*, 25 F.R.D. 506, 508 (S.D.N.Y. 1959); *Mil-Hall Textile Co.* v. *Dun & Bradstreet, Inc.*, 160 F. Supp. 778, 780 (S.D.N.Y. 1958); *Kinnear-Weed Corp.* v. *Humble Oil Refining Co.*, 214 F. 2d 891 (5th Cir. 1954).

Appellants did not claim any prejudice and merely asserted that the allegations were irrelevant. As has previously been shown such is not the case. The court therefore, committed reversible error. See *South Side Drive-In Co.* v. *Warner Bros.*, 30 F.R.D. 32 (E.D. Pa. 1962); *Irving Berlin, Inc.* v. *Anziano*, 4 F.R.D. 33 (S.D.N.Y. 1944).

POINT V

The District Court erred in refusing to dismiss the claims of appellees Taylor and Otey as moot notwithstanding that neither appellee continued to have a live grievance against the operation of § 352.30(d).

Pursuant to the direction of the United States Court of Appeals for the Second Circuit (A. 164, n.3), the issue whether certain of named plaintiffs presented a justiciable controversy was argued before the statutory three-judge court.* The court declined to rule on the issue as being unnecessary in light of the class action nature of the complaint.

In so doing, the court relied principally on *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). However, the rationale in *Richardson, supra* is inapposite to the instant case. *Richardson* was brought to the Supreme Court through the California state courts. As such, the class action determination and the propriety of plaintiffs there being representatives of the class even though the action was moot as to them, were matters of California not federal procedure, and hence not reviewable by the Supreme Court under federal standards.** 418 U.S. at 39.

In contrast, plaintiffs Otey and Taylor commenced the action in the United States District Court for the Eastern

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* At the time that the statutory issue was decided in the Circuit the Taylors' grants had been restored because the non-paying lodger began to receive aid under the existing Aid to Disabled Program. Subsequent to the Circuit Court's decision the Oteys' (the other putative class representative in the Eastern District action) grants had been restored because their non-paying lodger, an adult son, had established independent eligibility and thereafter established a separate household.

** As the controversy was not moot as to the entire class, a justiciable controversy continued to exist between the real parties in interest. Consequently, the Court still had jurisdiction. Compare *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

District of New York; and thus subject to both the case and controversy requirement of Article III, and the requirement that a class may only be represented in that court by a class member. It is significant to note that in writing for the court in *Richardson*, Justice Rehnquist pointed out (418 U.S. at 39):

> "... if this action had arisen in the federal courts there would be serious doubt as to whether it could have proceeded as a class action on behalf of a class of ex-felons denied the right to register after the three named plaintiffs had been granted that right."

See *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962); *Indiana Employment Security Div.* v. *Burney*, 409 U.S. 540 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 494-5 (1974).

In the instant case the claims of appellees Taylor and Otey had become moot, not through a voluntary cessation of activity on the part of defendants, but rather because of plaintiffs' voluntary change of circumstances taking them outside the scope of the regulation. Nor are the subsisting federal questions ones that fall within those cases where the act is capable of repetition yet evading review.* See *DeFunis* v. *Odegaard, supra.***

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* For this reason, *Sosna* v. *Iowa*, —— U.S. ——, 43 U.S.L.W. 4125 (1/14/75), which challenged the constitutionality of a one year residency requirement for the commencement of a divorce proceeding in the Iowa courts, is distinguishable *Id.* n. 9 at 4128.

** It is not contended that because of the Oteys' and Taylors' change in circumstances, the entire action must abate. Rather, it is urged that these named plaintiffs must be dropped as no longer being members of the class they purport to represent, and there is nothing left, as to them, to adjudicate, for they can no longer show that they are being injured by the operation of the regulations, nor is there any relief that the federal judicial power can grant to these plaintiffs *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972), cert. den., 411 U.S. 921 (1973).

The error in permitting Taylor and Otey to continue to remain in the case is that it allows the court to proceed on either hypothetical or stale facts to decide questions of law. In such instance, the court itself must become the advocate for the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" is absent. *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). Cf. *Golden* v. *Zwickler,* 394 U.S. 103, 190-110 (1969); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923).

POINT VI

The District Court erred in defining the appellee class to include recipients who share shelter with contributing lodgers and with non-paying lodgers and in invalidating both provisions of § 352.30(d) when those provisions are severable and no named appellee shared shelter with a contributing lodger.

The judgment and order of the District Court strike the entire of section 352.30(d) on the grounds of deprivation of due process (A. 661 *et seq.*) even though the section is severable. The regulation treats amounts actually contributed by the lodger (over $15) or boarding lodger (over $60) as income to the assistance group in accordance with the provisions of 42 U.S.C. § 602(a)(7). The only part of the regulation properly in issue, legislates for the instance where the lodger pays less than $15 per month.

It is of no significance that the contributing lodger provision is contained within the same section as that of the non-paying lodger. The settled principle of severability requires that only the bad be stricken, and the remainder be left to stand. As this Court wrote in *Dorchy* v. *Kansas,* 264 U.S. 286, 289-90 (1924): "Provisions within the legislative power may stand if separable form the bad. . . . But provisions inherently objectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act should fall." *Gatewood* v. *North Carolina,* 203 U.S. 531, 543 (1906); *Guinn* v. *United States,* 238 U.S. 347, 366 (1915); *Schneider Granite Co.* v. *Gast Realty Co.,* 245 U.S. 288, 290 (1917); *Baird* v. *Davoren,* 346 F. Supp. 515, 522 (D. Mass. 1972). *Harrison* v. *NAACP,* 360 U.S. 167 (1959); *United States* v. *Jackson,* 390 U.S. 570 (1968). An excellent

example is found in *Connell* v. *Higgen-bottom,* 403 U.S. 207 (1971), where the court enjoined part of an oath as unconstitutional, leaving the remainder to stand.

None of the named appellees shared her dwelling with a contributing lodger and thus no named plaintiff had standing to complain of the income offset. The District Court order in failing to observe this distinction, committed to two errors require partial vacatur Judgment and Order.

First, the court erred in defining the class to include both non-paying and contributing lodgers,* in violation of the requirement of Rule 23(a)(4), F.R. Civ. P. —— that is— that the representatives of the class be, in fact, members of the class. *O'Shea* v. *Littleton,* 414 U.S. 488, 495 (1974); *Indiana Employment Division* v. *Burney,* 409 U.S. 540 (1973); *Bailey* v. *Patterson,* 369 U.S. 31, 32-3 (1962). Recipients with non-recipient lodgers are divided into two distinct classes: those with lodgers who contribute $15 or more to the household, and those who don't. In this light, a class represented only by recipients with a non-paying lodger cannot represent a class of recipients with contributing lodgers.

Proceeding from the foregoing premise plaintiffs present no justiciable controversy with respect to the contributing lodger portion of the regulation, and therefore the district court could not obtain jurisdiction to enjoin its enforcement. In *O'Shea* v. *Littleton, supra* 414 U.S. at 493-4, the court wrote:

> "The complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of the federal

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* In the proceeding before Judge Bauman on the statutory issue, the class was defined the same way (A. 95-96). Subsequently, the Court issued an amended order defining the class to include only those who had their grants reduced, terminated, suspended or denied solely because of the presence of a *non-contributing* lodger (A. 99).

> courts must allege an actual case or controversy. *Flast* v. *Cohen,* 392 U.S. 83, 94-101 (1968); *Jenkins* v. *McKeithen,* 395 U.S. 411, 421-425 (1969) (opinion of Marshall, J.) Plaintiffs in the federal courts must allege some threatened or actual injury before a federal court may assume jurisdiction. *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617 (1973). There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question'. *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf. *United States* v. *SCRAP,* 412 U.S. 669, 687 (1973). Abstract injury is not enough. It must be alleged that plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged statute or official conduct. *Massachusetts* v. *Mellon,* 262 U.S. 447, 488 (1923).

Moreover, the requirement that income to the assistance group actually received from a contributing lodger be considered in determining the amount of assistance is valid. 42 U.S.C. § 602(a)(7) and Social Services Law § 131-a, subd. 1; *King* v. *Smith,* 392 U.S. 309 (1970). (See Point II, *ante* pp. 50-51).

Thus, in enjoining the enforcement of 18 N.Y.C.R.R. § 352.30(d), in its entirety, the District Court enjoined a severable portion of the regulation, never in issue, by its own terms clearly proper and at the instance of those who failed to either allege or demonstrate that the enforcement of that regulation in any way injured them. Such action was improper and warrants a partial reversal and vacatur of the Judgment and Order.

CONCLUSION

The judgment and order of the District Court in No. 74—543 should be reversed and the decision of the Second Circuit in No. 74—5054 should be affirmed. Alternatively, the judgment and order of the District Court in No. 74—453 should be vacated and the cause remanded to the District Court for further proceedings.

Dated New York, N.Y., February 20, 1974.

Respectfully submitted,

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Exhibit "1".

18 N.Y.C.R.R. § 352.30. Persons included in the budget.

(a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household. Members of the family temporarily absent from the home shall be included as a member of the household in the budgetary estimate, such as children or minors attending school away from home, except when maintenance is provided without cost.

(b) For purposes of the schedule of monthly grants and allowances (Schedule SA-2 of section 352.2 of this Part) only, the household of a pregnant woman shall be deemed increased by one person from the fourth month of medically verified pregnancy.

(c) When an applicant or recipient willfully fails or refuses to comply with the requirements of Part 385 of this Title the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro-rata basis for the eligible family members only.

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

Exhibit "1".

§ 352.31. Estimate of need and application of income.

(a) *For applicant or recipient.*

(1) The estimate of need for any applicant or recipient shall include all items of need as specified in these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of need shall be the appropriate amount provided in accordance with the schedules and other provisions of these regulations. To the extent that an item offered is otherwise provided it shall not be included in the estimate of need, but the manner in which such item is provided shall be recorded.

(2) All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, including support payments required to be made by a parent pursuant to an order of the family court or other appropriate court, shall be protrated and applied against the needs of the applicant, the spouse and the minor children of either or both. The income of a legally responsible relative in the home who has been disqualified under Part 385 of this Title shall be applied in determining eligibility and degree of need for himself as if he were a member of the family, and the family members for whom he is responsible. The amount of the grant for the eligible family members shall be provided on a pro-rata basis in accordance with section 352.30(c). Under exceptional circumstances other than disqualification under Part 385, a spouse who refuses to make application for assistance and to have his income so applied against the needs of his family, shall have his needs estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents.

Exhibit "1".

(3) When an applicant or recipient is living, other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:

(i) When the person is willing his or her available income and resources shall be applied in determining eligibility and degree of need.

(ii) When the person is willing to assume responsibility only for his or her own needs, the needs of the applicant or recipient, and those children for whom such person is legally responsible, the available income or resources of such person shall be applied in determining eligibility and degree of need of those persons only; and assistance for any remaining children shall be provided on a pro rata basis.

(iii) When the person is willing to assume responsibility only for his or her needs, and the needs of those children for whom such person is legally responsible, the available income and resources of such person shall be applied in determining eligibility and degree of need of those persons only; and assistance for the applicant or recipient and remaining children shall be provided on a pro rata basis.

(iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part.

Exhibit "1".

(v) The foregoing shall not affect the responsibility of such person to provide support for children for whom such person is legally responsible, nor shall it relieve the social services official from his responsibility to initiate appropriate support proceedings.

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Exhibit "2".

RELATED STATUTES AND REGULATIONS

Federal Statutes

42 U.S.C.

§ 601. *Authorization of Appropriations*

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out this part. The sums made available under this section shall be used for making payments to states which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

§ 602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must

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(7) . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be

Exhibit "2".

considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

• • •

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;

§ 606. *Definitions*

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

(b) The term "aid to families with dependent children" means money payments with respect to, or . . . medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care

Exhibit "2".

recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—[Subdivision continues describing conditions under which protective payments are authorized.]

• • •

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

Exhibit "2".

FEDERAL REGULATIONS

45 C.F.R.[•]

§ 233.20. *Need and amount of assistance*

(a) *Requirements for State Plans*

A State Plan for . . . AFDC . . . must, as specified below: (1) *General.* Provide that the determination of need and the amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way except where otherwise specifically authorized by Federal statute.

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§ 233.90 *Factors specific to AFDC*

(a) *State plan requirement*

A State plan under Title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis

[•] October 1, 1973 rev. ed.

Exhibit "2".

for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only if the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

STATE STATUTES

Social Services Law

§ 131. *Assistance, care and services to be given*

1. It shall be the duty of the Social Services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves in accordance with the requirements of this Article [5—Assistance and Care] and other provisions of this chapter [55 of the Consolidated Laws of New York State]. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.

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3. As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone and they shall be provided with services to help maintain and strengthen family life. • • •

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4. For needy persons who are members of a family household, the standard of need for their determining

Exhibit "2".

eligibility for public assistance shall be as prescribed by section one hundred and thirty-one-a of this chapter and applicable federal requirements • • •.

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§ 131-a *Monthly grants and allowances of public assistance*

1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall, in accordance with the provisions of this section and regulations of the department, provide home relief, veteran assistance, old age assistance, assitance to blind, aid to the disabled and aid to dependent children, to needy persons who constitute or are members of a family household, who are determined to be eligible in accordance with standards of need established in subdivision two. Provision for such persons, for all items of need, less any available income or resources which are not required to be disregarded by other provisions of this chapter, shall be made in accordance with this section. Such provision shall be made in monthly or semi-monthly allowances and grants within the limits of the schedules included in subdivision three of this section except for additional amounts which shall be included therein for shelter, fuel for heating, additional cost of meals for persons who are unable to prepare meals at home and for other items for which specific provision is otherwise made in article five. As used in this section the term "shelter" may include a grant not to exceed seven hundred and fifty dollars toward the purchase of an interest in a co-operative • • •.

2. The following schedule shall be standard of monthly need for determining eligibility for all categories of assistance in and by all social services districts:

Exhibit "2".

Number of Persons in Household[•]

One	Two	Three	Four	Five	Six
$94	$150	$200	$258	$318	$368

For each additional needy person in the household there shall be added an additional amount of fifty dollars monthly.

In addition to the above, the standard of need shall include amounts for shelter and fuel for heating, amounts for additional costs and meals for persons who are unable to prepare meals at home and amounts for other items when required by individual case circumstances for which specific provision is otherwise made in article five of this chapter.

3. Persons and families determined to be eligible by the application of the standard of need prescribed by the provisions of subdivision two less any available income or resources which are not required to be disregarded by other provisions of this chapter, shall receive maximum monthly grants and allowances in all social services districts in accordance with the following schedule, for home relief (including veteran assistance) and aid to dependent children:

Number of Persons in Household[•]

One	Two	Three	Four	Five	Six
$94	$150	$200	$258	$318	$368

[•] Effective July 1, 1974.

The standard of need and the amount of assistance under the prior schedules were: One—$84; Two—$150; Three—$179; Four—$258; Five—$318 and Six—$329 plus $45 for each additional person.

Exhibit "2".

For each additional eligible needy person in the household there shall be an additional allowance of fifty dollars monthly.

§ 145. *Penalties*

1. Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fradulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law. Failure on the part of a person receiving public assistance or care to notify the social services official granting such assistance or care of the receipt of money or property or income from employment or any other source whatsoever, shall, upon the cashing of a public assistance check by or on behalf of such person after the receipt of such money, or property, or income, constitute presumptive evidence of deliberate concealment of a material fact. Whenever a social services official has reason to believe that any person has violated any provision of this section, he shall promptly refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official, who shall immediately evaluate the facts and evidence and take appropriate action.

2. The provisions of subdivision one of this section shall apply to social services officials and employees,

Exhibit "2".

who shall also be subject to removal and shall be liable in an action brought by the county or city, or by the state commissioner of social services, for the value of the public assistance improperly granted to any person as a result of the wilful wrongful act of such official or employee.

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§ 343. *Declaration of Object* [*of Aid to Dependent Children Program*]

It is hereby declared a state policy that aid to dependent children be provided under the provisions of this title in every county of the state.

§ 344. *Responsibility*

1. Each public welfare district shall be responsible for providing aid to dependent children, under this title, to persons eligible therefor who reside in its territory • • •.

§ 349. *Eligibility*

A. Aid to dependent children shall be given to a parent or other relative as herein specified for the benefit of a child or minor under eighteen years of age, or of a minor under twenty-one years of age who is a student regularly attending high school in pursuance of a course of study leading to a high school diploma or its equivalent, or is regularly attending a course of vocational or technical training designed to fit him for gainful employment or of a college or university whose curriculum is approved by the state department of education • • •

Exhibit "2".

§ 350. *Character and Adequacy*

1. (a) Allowances shall be adequate to enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child, in accordance with the provisions of section one hundred thirty-one-a of this chapter and other applicable provisions of law. Allowances shall provide for the support, maintenance and needs of one or both parents if in need, and in the home and for the support, maintenance and needs of the other relative if he or she is without sufficient means of support, provided such parent, parents and relative are not receiving federal supplemental security income payments and/or additional state payments for which they are eligible. The social services official may, in his discretion, make the incapacitated parent the grantee of the allowance and when allowances are granted for the aid of a child or children due to the unemployment of a parent, such official may make the unemployed parent the grantee of the allowance.

STATE REGULATIONS

18 N.Y.C.R.R.

§ 352.3. *Rent allowances*

(a) Each social services district shall establish a monthly allowance schedule for rent based on that number of rooms, with or without heat, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in

Exhibit "2".

excess of the appropriate maximum of such schedule.[*]

• • •

(c) For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend or SSI beneficiary, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis but not in excess of the appropriate agency maximum for the number of people in the assistance grant.[**]

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§ 352.7. *Allowances and Grants for other Items of Need.*

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(f) Allowances for essential persons in ADC . . .

(1) A grant made to a recipient of . . . ADC shall include the needs of other persons, whether the relative or non relative of such recipient, whose presence in the same home as the recipient is essential to the recipient's well-being provided such persons:

(i) reside in the same home as the recipient;

(ii) are eligible for public assistance other than . . . ADC on the basis of income and resources;

(iii) agree to render necessary services and care to the recipient; and further provided that

(iv) the recipient approves the plan.

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[*] A state-wide schedule of maximum monthly shelter allowances by county and by public assistance family size is published at 18 N.Y.C.R.R. § 352.3(a) but has not yet become effective.

[**] Effective July 26, 1974. Former subdivision (c) stated: For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis.